

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period:
From July 1, 1937
Through September 30, 1937

VOL. III

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act of the Legislature of Alabama found on page 1114 of the General Acts of Alabama, Regular Session, 1935, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from July 1, 1937 through September 30, 1937.

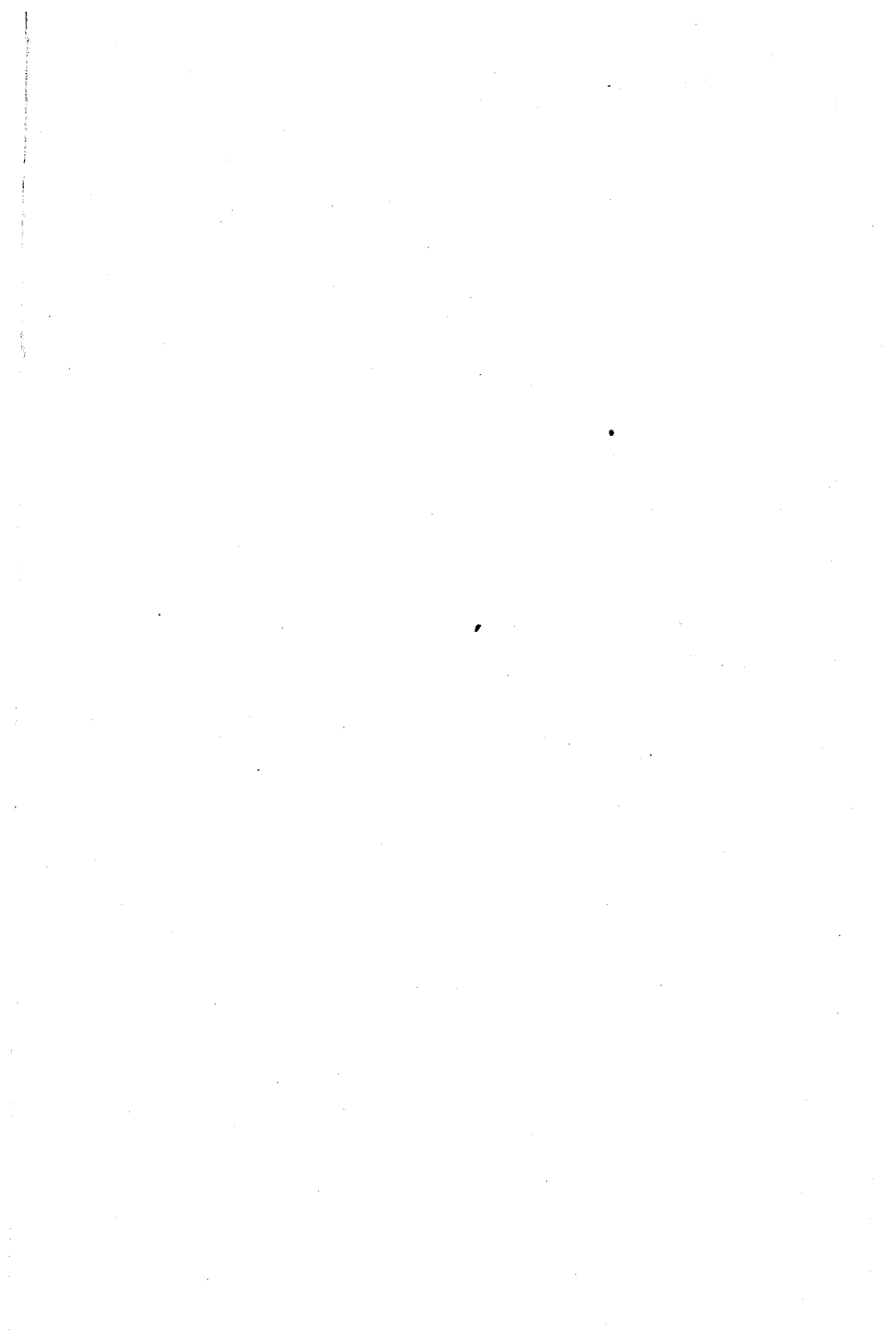
The Act referred to above requires that six copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, and the County Superintendent of Education.

The Office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
A. A. CARMICHAEL,
Attorney General.

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OPINIONS



July 2, 1937.

(Opinions extended—See opinion to Dr. J. N. Baker, August 14, 1937.)

Hon. M. T. Maxwell, Secretary & Pur. Agent,
Board of Revenue, Tuscaloosa County,
Tuscaloosa, Alabama.

Counties—Alabama Sales Tax Act—Use of Money.

County authorized to use proceeds derived from Alabama Sales Tax Act to defray expenses incurred for burial of paupers, for registration of births and deaths, maintaining a charity ward in a hospital, maintaining a tubercular preventorium, and to pay a salary of nurse used in rest room of County Court House.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date, which I quote as follows:

"We received a copy of your opinion to Hon. P. C. Black, Probate Judge of Geneva County, for which we thank you.

"There is one point, however, that is not quite clear in our minds and we would appreciate your opinion on same. We appropriate certain sums of money to Public Welfare, Health, and Home and Farm Demonstration work which monies are used by these departments in co-operation with the State Board of Health, the State Department of Public Welfare and the Alabama Extension Service. There are some items, however, which we are paying out of the general fund separate and apart from appropriations mentioned above but expenditures on these certain items are in the interest of health and public welfare and working toward a common end.

"These special items are as follows: Burial of Paupers, Registration of Births and Deaths, Maintaining a Charity Ward in the Druid City Hospital, Tubercular Preventorium, Special Charity, a Rest Room with Nurse in the County Court House, The question is; Would it be legal to pay monies out of the Special Sales Tax Fund for any of these services?"

It is my opinion that the county is authorized to use such portion of the money it derives from the taxes imposed by the Alabama Sales Tax Act, as the governing officials deem proper, for the burial of paupers, registration of births and deaths, maintaining a charity ward in a hospital, maintaining a tubercular preventorium, and to pay the salary of a nurse used in the rest room of the County Court House and to take care of other special charities. It is my view that these enumerated expenses fall within the purview of the act which designates the use of the money.

With reference to the nurse used in the rest room of the County Court House, I wish to distinguish between a nurse and a mere janitress. I do not think that you would be permitted to use the money or any portion thereof for paying the salary of a janitress who does not perform the duties of a nurse. Opinion to Judge P. C. Black, Geneva, Alabama, April 27, 1937, Vol. 16-A, Office Edition.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 2, 1937.

Hon. A. D. Sherrill,
Tax Collector,
Colbert County,
Tusculumbia, Alabama.

Taxation—Municipal Taxes—Section 201 of the Revenue Acts of 1935 (formerly Section 3095 of the 1923 Code).

1. Notice of sale by tax collector under Section 201, supra, to sell property for payment of city taxes may be included in notice of sale for payment of State and County taxes provided notice lists separately the amount of city taxes, and costs of sale therefor.

2. Tax collector is not required to make separate report of delinquent municipal taxes to the Judge of Probate, but such delinquency may be included in report made of delinquent State and County taxes provided amount of city taxes is listed separately in the report, and a merger of amounts avoided.

3. Report of delinquency, supra, may be entered in the same book, and a joint decree may be rendered by the Probate Judge for the sale of the property in payment of the State and County taxes and of the city taxes, provided said decree recites and identifies the amount of city taxes and other lawful items for which the property is ordered sold.

4. Tax collector may on same day that he sells property for payment of State and County taxes, proceed to offer the property for sale in payment of the city taxes and lawful costs.

5. Municipality authorized, but not required, to purchase property at its own tax sale. Tax collector not liable for failure to sell if there is no purchaser.

6. Judge of Probate is the proper officer to render decree of sale for city taxes.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date which is quoted as follows:

"As provided by Section 201 of the Revenue Act of 1935, several municipalities in this County have adopted ordinances providing that the Tax Assessor shall assess and the Tax Collector shall collect municipal taxes.

"In a number of assessments it has become necessary for me to collect taxes due the State, County and municipalities by sale of the property for failure to pay the taxes assessed for the State, County and municipalities.

"1. I desire to know whether or not the advertisement of sale of the property for municipal taxes to be placed in the newspaper shall be a separate notice or advertisement from the advertisement of sale for State and County taxes.

"2. I desire also to know whether or not I should make a separate report of the delinquent municipal taxes to the Judge of Probate to secure a decree of sale or whether such report should be included in my report of the State and County taxes, which I file with the Judge of Probate for a decree of sale.

"3. I desire also to know whether the report of delinquent taxes filed with the Judge of Probate for a decree of sale should be entered in a separate decree book and a separate decree rendered by the Judge of Probate for the municipal taxes, or whether the same report of sale and decree book will answer that is used for the State and County taxes.

"4. Please also advise whether the sale for the municipal taxes can be held on the same day of the sale for the State and County taxes, and in the event there is no offer of purchase from an individual for the property for municipal taxes, whether it is the duty of the municipality to purchase the property for such municipal taxes.

"5. Please also advise me whether the Judge of Probate is the proper court to render the decree of sale for municipal taxes.

"6. In the event it is necessary to secure a separate decree book for municipal taxes and to advertise the sale separately from the State and County sale, should the County or the municipality bear the cost of such decree book and advertisement?"

Section 201 of the Revenue Act, Acts of 1935, p. 348, reads as follows:

"Section 201. Any municipal corporation in this State, may, by ordinance duly adopted, provide for the assessment, equalization and collection of taxes due such municipality, by the officers and boards provided in this Chapter, and all the machinery herein provided for the assessment, equalization and collection of State and County taxes, the enforcement of such collection, the sale of property taxes and the redemption from such sales, shall be applicable to the assessment and collection of such municipal taxes, the sale of property for the collection of such municipal taxes and the redemption from such sales, and the assessor and collector shall receive such compensation as may be fixed by the governing body of such municipality, not to exceed one-half of one percent for assessing and one-half of one percent for collecting."

The foregoing section formerly appeared as Section 3095, Code of Alabama, 1923, and was re-enacted in 1935 as above quoted.

Section 2145, Code of Alabama, 1923, reads as follows:

"Section 2145. Redemption by municipality.—The city or town may redeem property at any sale made by the state for taxes, upon the same terms as required by law for owners to redeem, and no person shall be allowed to redeem from the municipality, without paying to the city or town the amount paid to redeem such property and all claims of the city or town thereon for taxes, assessments, and penalties or otherwise, and no redemption shall be made in any case from the municipality, or from a purchaser after two years from the date of the sale."

Section 2129, Code of Alabama, 1923, reads as follows:

"Section 2129. Taxes; lien of.—Cities and towns shall have a lien for taxes upon all property assessed for taxation, which shall be superior to all other liens, except for taxes held by the state and county."

When the legislature re-enacted Section 3095 of the Code of 1923 by enacting Section 201, Revenue Acts of Alabama, 1935, *supra*, they intended that the administrative procedure authorized by said Section 201 in the assessment and collection of municipal taxes should at all times recognize and respect the superiority of the lien for State and County taxes, and at no time did they intend that such administrative procedure should tend to subordinate or displace the superiority of such lien. The legislature merely offered to the municipalities the machinery of the State in assessing and collecting taxes, and provided that it might invoke the aid of such machinery by adoption of proper ordinance. The legislature did not intend that the amounts of the State and County taxes, and the amount of the city taxes should be combined, nor that any procedure should be adopted that would lead to confusion, but on the other hand, they did intend to permit the use of all machinery of the State in the assessment and collection of city taxes by the county tax assessor and collector, provided such procedure is not combined or confused in such manner as would tend to retard the sale of property for State and County taxes or as would unwittingly seem to place the lien for city taxes on equality with a lien for State and County taxes.

With the foregoing legislative intent in mind and with due deference thereto, it is my opinion as follows:

1. The tax collector, pursuant to the terms of Section 201, General Revenue Acts of Alabama, *supra*, is not required to give separate notice of sale of city property for the payment of city taxes and the lawful costs therefor, but he may include such sale in his notice of the sale of property in satisfaction of the lien for State and County taxes, provided he lists separately in the notice the amount of city taxes and costs therefor. If such separation is made, the tax collector will have informed all prospective purchasers of the separate liens, and the amounts due thereunder, and at the same time, he will have preserved the legal priority of the lien for State and County taxes. It is my opinion that a separate advertisement would be repetitious and wholly unnecessary to effect a lawful sale of the property for city taxes and lawful costs. The law authorizes and permits the use of the machinery of the State for the assessment and collection of city taxes. When the tax collector includes the city taxes in the notice of sale for State and County taxes, he is using the machinery of the State to make such sale, but at the same time, by separating the amount of the city taxes and costs, from the State and County taxes, he is avoiding confusion and is preserving the priority of the State and County tax liens.

2. It is further my opinion that the tax collector is not required to make separate report of the delinquent municipal taxes to the Judge of Probate, but he may report such delinquency of the municipal taxes in the same report that he makes for delinquent State and County taxes, provided he again keeps separate and distinct the amount of city taxes, and other charges connected therewith required to be made in said report, from the amount of State and County taxes on the same property. Such separation and identification avoids confusion and preserves the priority of State and County taxes as the legislature intended should be done. A merger of the amounts might lead to confusion and might be mistaken as an administrative effort to place city taxes on a parity with State and County taxes, contrary to the intent of the legislature.

3. The report of delinquency made by the tax collector may be entered in the same book with the report of delinquency of State and County taxes. The probate judge is authorized and empowered to render a joint decree although a separate decree may be entered if he so desires for the sale of

the property in payment of city, state and county taxes, provided he recites in said joint decree the amount of city taxes and lawful items due the city for which the property is already sold. A combined decree, properly identifying taxes due under separate tax liens, in my judgment, further tends to preserve the priority of State and County taxes, avoids confusion and at the same time permits the use of the machinery of the State pursuant to the intent of the legislature.

4. It is also my opinion that the tax collector may proceed to offer the property for sale in payment of the city taxes on the same day that he offers the property for sale in satisfaction of the lien for State and County taxes. Separate auctions of the property for sale under the lien for municipal taxes under the lien for State and County taxes should be made.

5. A municipality is authorized but not required by Section 2140, Code of Alabama, 1923, to purchase at its own tax sale, but if it fails to do so, or if a purchaser fails to appear, the tax collector is not responsible therefor, and has no authority to bid in the property in the name of the State. Section 201, General Revenue Acts of 1935, *supra*, authorizes use of the machinery of the State in assessing and collecting municipal taxes. It does not follow that the use of such machinery includes authority on the part of the State to purchase the property in payment of city taxes.

6. It is the duty of the Judge of Probate to render a decree of sale for city taxes. I have already fully discussed the decree in this opinion.

I expressly overrule that portion of the opinion of this office, dated September 8, 1932, to Hon. J. D. Starkey, Tax Collector of Jackson County (Biennial Report of the Attorney General, 1930-32, p. 1005) which holds that there is no provision of law for selling real estate in payment of city taxes under the same decree of the Probate Court for payment of city taxes, and also that same statement in an opinion of this office dated July 18, 1936, to Hon. Gowan Roberts, Talladega, Alabama, Quarterly Report of the Attorney General, Vol. 4, p. 51, which refers to the opinion of this office to Mr. Starkey.

I also overrule an opinion of this office dated December 29, 1934, to Hon. B. L. Malone, Judge of Probate, Morgan County, Decatur, Alabama, Book I (a), (Office Edition) p. 140.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 6, 1937.

Hon. Frank Pearce,
Tax Assessor,
Marion County,
Hamilton, Alabama.

Taxation—Homestead Exemption, Act 107, Special Session of the Legislature 1936-37.

A lot in a city upon which is erected a small building, divided into rooms, used as a home, in connection with which a filling station is operated and a small line of fancy groceries carried, is

a homestead and is exempt from taxation not in the excess of two thousand dollars in assessed value.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"Please advise me on the following: A man purchases a lot in the city and erects a small brick building, dividing it up into rooms and using this building as his home and in connection he operates a filling station and carries a small line of fancy groceries. Question: Would this man be entitled to receive the benefit of the homestead exemption?"

It is my opinion that the property which you describe and which is used as you have written is eligible to be claimed as a homestead and exempt from taxation in a sum not in excess of two thousand dollars in assessed value. I am assuming from your letter that the sale of the groceries and gasoline is secondary to the residential occupation of the lot and the house. On this subject the Supreme Court of Alabama in the case of Marx v. Thrett, 131 Ala. 345, has ruled as follows:

"Manifestly the dominant use of the lots was that of a dwelling place. The use of the store-house for the sale of merchandise under the facts of this case did not convert the premises into a place incidental or secondary only to its habitation as a home, any more than the cultivation of a portion of the premises as a garden would destroy their character as a home place."

On the above assumption of facts, it is my opinion that the property is used as a homestead and therefore eligible to exemption from State taxes within the limits provided by law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 6, 1937.

Hon. H. R. Molton,
Commissioner, Fourth District,
Clarke County,
Jackson, Alabama.

Unemployment Compensation—Federal Unemployment Compensation Tax—

1. Employees of counties held not subject to taxes provided for by Federal Social Security Act, Title VIII.
2. County Commissioners held not subject to tax as provided for by Federal Social Security Act, Title VIII on their compensation for services as County Commissioners.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"With reference to the Federal Social Security Act, title VIII, I wish your opinion as to the following:

"(1) Are employees of Counties, specifically men employed as laborers on the public road of the County, subject to this tax?

"(2) Are County Commissioners subject to this tax on their compensation for services as County Commissioners?"

In reply I wish to advise you that Title VIII of the Social Security Act to which you refer in your request, in my opinion, does not include a tax upon the services of employees of the State or any political subdivision thereof nor does the Social Security Act impose a tax upon the services of the County Commissioners.

I refer you to Section 811 (b) of the Social Security Act, which provides in part as follows:

"The term 'employment' means any service * * * except-

"(6) Service performed in the employ of the United States Government or of an instrumentality of the United States;

"(7) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions; * * *

You will note that the exemptions here provided are applicable to States or any political subdivision thereof, or an instrumentality of one or more States, or political subdivisions. The County is clearly not an independent governmental entity yet it is by its very nature a phase of municipal corporation which, of necessity, possesses some governmental qualities of the State and is a political subdivision of the State. I wish to refer you to Words & Phrases, 3rd Series, Vol. 2, pages 574, 575, for numerous authorities defining a county as a political subdivision of the State of which the county is a part.

It is a well established principle of constitutional law that the State and the Federal governments are limited in their power to levy taxes on each other's functions. In the famous case of **McCulloch v. State of Maryland et al** (1819), 17 U. S. 315, the Supreme Court of the United States in holding unconstitutional and void a tax upon the operation of the Bank of the United States said:

"Both indicate * * * the State has no power, taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

Likewise, it has been held that the Federal government may not impose taxes on the government of the States. I refer you to the case of **Collector v. Day** (1870) 11 Wall. 113.

"The reason for immunity is based on the necessary protection of the independence of the national and state governments within their respective spheres and under our constitutional system."

Wanless Iron Co. v. Commission (1935) 75 Fed. (2d) 779, citing **Helvering v. Powers** (1934) 55 Sup. Ct. 171, 173.

Not all agencies of the State or Federal government are immune from taxation. Generally the activities of a government are divided into two

classes, those which are governmental in nature and those which are proprietary or private in nature. The former are free from taxation by another sovereignty, the latter are not. The principle is clearly expressed in the following excerpt from *Metcalf & Eddy v. Mitchell* (1926), 269 U. S. 514:

"Just what instrumentalities of either a state or the federal government are exempt from taxation by the other can not be stated in form of universal application. But this court (United States Supreme Court) has repeatedly held those agencies through which either government immediately and directly exercises its sovereign powers are immune from the taxing power of the other. Thus the employment of officers who are agents to administer its laws (*Collector v. Day*, 11 Wall. 113; *Dobbins v. Commissioner of Erie County*, 16 Pet. 434) * * * are all so intimately connected with the necessary functions of government, as to fall within the established exemption; * * *."

"As cases arise lying between the two extremes if it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experiences show that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reasoning upon which the rule rests, and which must be the guiding principle to control its operation. If origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limit of the state; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other."

It is clear then, that, irrespective of whether or not any specific exemption is made, neither the states nor the federal government may tax wages paid by a government or its agency or instrumentality or a political subdivision in performing a strictly governmental function. However, wages paid in performing a proprietary or private function are subject to tax unless specially exempted. In this connection, it should be observed that the provisions in the Social Security Act specifically exempting government employment do not distinguish between purely governmental functions and such as are private. It would seem to follow, therefore, as a natural consequence that both types of employment would consequently be exempt under these specific provisions. I wish to further refer you to a ruling of the Internal Revenue Bureau which, for convenience sake, I will set out in full hereafter:

" 70-S. S. T. 74

Bureau of Internal
Revenue Rulings
XVI-3-8493 S. S. T. 74
Section 907; Definitions.

Regulations 90, Article 206 (5)-(6): Government employees (Also Section 811; Regulations 91, Article 11.)

"Services performed by the employees of the M. Company, which is wholly owned by a county and a city in the State of R and which operates ferries in that State, come within the exception provisions of section 907 (c)6 and 811(b)7 of the Social Security Act.

"Advice is requested whether the M Company and its employees are subject to the taxes imposed by Titles VIII and IX of the Social

Security Act. The company is owned by the county of _____ and the city of _____, State of R. It operates ferries between certain cities in that State. The profits derived from operation of the ferries are divided between the county and the city.

"Title IX of the Social Security Act provides in section 901 for the levy of an excise tax upon employers (as defined in the Act) with respect to having individuals in their employ. The measure of the tax is the total amount of wages payable by an employer with respect to employment during the calendar year regardless of the time of payment. Section 907(c)6 of the Act provides in part as follows:

" '(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except— * * *

" '(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions.'

"Title VIII of the Social Security Act imposes an income tax upon employees and an excise tax upon employers, and section 811(b)7 thereof is identical with section 907(c)6 quoted above.

"Article 206(5)-(6) of Regulations 90 and article 11 of Regulations 91, relating to the taxing provisions of Titles IX and VIII of the Act, respectively, provide that the exception relative to services performed by State employees extends to every service performed by an individual in the employ of the several States, or any political subdivision or instrumentality thereof, including every unit or agency of government, without distinction between those exercising functions of a governmental nature and those exercising functions of a proprietary nature. Since the M Company is owned and operated as an instrumentality of the county of _____ and the city of _____, political subdivisions of the State of R, the excepting provisions of sections 907(c)6 and 811(b)7 of the Act extend to the services performed by the employees of that company. The organization and its employees are not, therefore, subject to the taxes imposed by the Social Security Act."

The premises considered, it is my opinion and I do so hold here, that wages paid to employees of Commissioners on the public road of the county are not subject to the tax imposed by the Federal Social Security Act, Title VIII, nor is compensation paid to County Commissioners for performance of their duties imposed by law upon them as County Commissioners, in the service of the County, subject to the taxes imposed by the Federal Social Security Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 6, 1937.

Hon. Haygood Patterson,
Sheriff, Montgomery County,
Montgomery, Alabama.

Uniform Firearms Act—

1. Act as amended provides for issuance of license only by Sheriff.
2. License may be revoked for cause which would have justified its refusal in the first instance.
3. Act as amended excepts licensed pawnbrokers from provisions regulating sales as set forth in Section 9.
4. Individual may loan, give or sell a pistol by meeting the provisions of the Act.

Opinion by Assistant Attorney General Knaebe.

Dear Sir:

I have your letter in which you request my opinion as follows:

"Please give me your opinion with reference to the following questions concerning Senate Bill 63 (Simpson), commonly known as the pistol law, effective date October 1, 1936:

"(1) Sec. 7. Since the Probate Judge in regular practice remits licenses and fees to the State and is an office of record for such payments to the state, would it not simplify the operation of this section of the act for the Probate Judge of each county to issue all such licenses upon the approval of each application by the Chief of Police of the municipality in which the applicant lives or by the Sheriff of the County? In this way there will be a concentration of records and uniformity of payment of fees into the State treasury?

"(2) When a person has been issued a license to carry a pistol according to the provision of Section 7, will it be possible to revoke said license for any cause?

"(3) Sec. 12. If a person has pawned a pistol prior to the effective date of this act, can the pawnbroker deliver the pistol to the person pawning it or to any other person without being subject to the dealer's license? What restrictions are placed on a pawnbroker or any person accepting a pistol as a mortgage, deposit or pledge by the provisions of this act?

"(4) If an individual not a dealer wants to give, loan or sell a pistol, what is required of him by the provisions of this act?

"These questions have been asked me by many citizens, and since the act is now in operation will appreciate your opinion as soon as convenient."

I am of the opinion that your inquiries should be answered as follows:

1. Section 7 of the Uniform Firearms Act has been amended by an Act approved March 2, 1937 (Governor's No. 190, H. 161, Douglas) and now provides for the issuance of licenses only by a Sheriff.

2. The general rule is that a license may be revoked for any reason that would have justified a refusal to issue it in the first place. Where the Act enumerates the causes for which a license may be revoked, it is usually held that it cannot be revoked for a cause not enumerated. As no causes are mentioned in the Uniform Firearms Act, for which license may be revoked, the general rule will apply and the license may be revoked for any reason that would have justified a refusal to issue it in the first instance, 37 C. J., Section 110 at page 247.

3. Section 12 of the Uniform Firearms Act must be construed in connection with Section 9 of said Act as amended March 2, 1937. This section as amended provides in part:

"This Section shall not apply to sales at wholesale, nor to the pawning or pledging of a pistol by the owner thereof to a pawnbroker licensed by the state and by the municipality in which he does business."

4. A pistol may be loaned to a person who has a permit to carry same, but the Uniform Firearms Act makes no provision for the selling of a pistol by an individual.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 6, 1937.

Hon. R. A. Polglaze,
Secretary, State Board of Registration,
for Professional Engineers and Land Surveyors,
1118 Webb-Crawford Bldg.,
Birmingham, Alabama.

Members of State Board of Registration for Professional Engineers and Land Surveyors held entitled to reimbursement for all actual traveling expenses necessarily incurred in carrying out the provisions of Act No. 271, General Acts of 1935, page 661, approved September 2, 1931, which is the Act creating said Board, as provided by Section 5 thereof, the said monies to be paid out of the "Professional Engineers Fund" provided for in Section 9 of said Act, in the manner provided in said section for the payment of the same.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

I have your letter in which you request my opinion as follows:

"Is the Comptroller authorized to reimburse the members of this Board for all actual traveling expenses necessarily incurred in carrying out the provisions of the Act, as provided for in Section 5 of Act No. 271?"

Act No. 271, General Acts of 1935, page 661, approved September 2, 1935, is the Act which created the State Board of Registration for Professional Engineers and Land Surveyors, defined its powers, duties and functions,

and provided for the compensation of its members. The pertinent provisions of said Act are Section 5 and Section 9. These sections read as follows:

"Section 5.—COMPENSATION AND EXPENSES OF BOARD MEMBERS. Each member of the Board shall receive a nominal sum of five (5.00) dollars per diem when actually attending to the work of the Board or of any of its committees and for the time spent in necessary travel; and, in addition thereto, shall be reimbursed for all actual traveling, incidental and clerical expenses necessarily incurred in carrying out the provisions of this Act. Such compensation and expenses shall be paid as provided in Section 9 of this Act."

"Section 9.—RECEIPTS AND DISBURSEMENTS. The Secretary of the Board shall receive and account for all moneys derived under the provisions of this Act, and shall pay the same monthly to the State Treasurer, who shall keep such monies in a separate fund to be known as the 'Professional Engineers Fund.' Such fund shall be kept separate and apart from all other monies in the Treasury, and shall be paid out only by warrant of the State Auditor upon the State Treasurer, upon itemized vouchers, approved by the Chairman and attested by the Secretary of the Board. All moneys in the 'Professional Engineers Fund' are hereby specifically appropriated for the use of the Board. The Secretary of the Board shall give a surety bond to this State in such sum as the Board may determine. The premium on said bond shall be regarded as a proper and necessary expense of the Board, and shall be paid out of the 'Professional Engineers Fund'. The Secretary of the Board shall receive such salary as the Board shall determine in addition to the compensation and expenses provided for in Section 5. The Board may employ such clerical and other assistants as are necessary for the proper performance of its work, and may make expenditures of this fund for any purpose which in the opinion of the Board is reasonably necessary for the proper performance of its duties under this Act, including the expense of the Board's delegates to annual convention of, and membership dues to, the National Council of State Boards of Engineering Examiners. Under no circumstances shall the total amount of warrants issued by the State Auditor in payment of the expenses and compensation provided for in this Act exceed the amount of the examination and registration fees collected as herein provided."

Therefore I advise you that the members of this Board are entitled to reimbursement for all actual traveling expenses necessarily incurred by them in carrying out the provisions of the said Act, as provided by Section 5, supra, and that payment for the same shall be out of the "Professional Engineers Fund" provided for by Section 9 of the said Act, supra, in the manner provided in said section for the payment of the same.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 6, 1937.

Hon. Charles W. Lee,
State Comptroller,
Capitol.

License—College supply store operated by State Teachers College is liable for license taxation.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter stating:

"The College Supply Store of the State Teachers College of Florence, Alabama, operated by the College for the convenience of the students and profits therefrom belonging to the General Fund of the College, has paid the State Tax Commission Carbonic Gas Tax and Chain Store License and also has paid the Probate Judge of Lauderdale County Privilege License.

"Is the College Supply Store subject to any of the above tax and license?

"If not, is a refund of the amounts paid proper?"

In my opinion, the College Supply Store is subject to taxes and licenses referred to in your request.

Of course, it is a general rule that in the absence of clearly expressed legislative intent, agencies of the State are not taxed. *State v. City of Montgomery*, 151 So. (Ala. Sup.) 856; *Madison County v. City of Huntsville*, 166 Ala. 381. However, in order for this rule to apply, the agencies of the State must be authorized by law to engage in the business as a part of the mission for which it was created. The operation of a supply store does not tend to carry out any of the missions or functions for which the State Teachers College was created.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 6, 1937.

Hon. W. E. Butler,
Probate Judge, Madison County,
Huntsville, Alabama.

Juvenile Court Records—Kept in office of Probate Judge.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of September 16, 1936, which is as follows:

"Will you kindly give me your official opinion on the following question:

"Should the records of the Juvenile Court be kept in the office of the Judge of Probate, or is it proper that such records be kept in the office of the Welfare Department?"

Under the provisions of Chapter 100, Sections 3528-3566, Code of Alabama, 1923, as amended by an Act approved July 29, 1931, (General Acts 1931, p. 353) (Michie's Supplement, 1936), it is my opinion that the records of the Juvenile Court should be kept in the office of the Probate Judge.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 6, 1937.

Hon. John J. Flowers,
Tax Assessor,
Montgomery, County,
Montgomery, Alabama.

Taxation—Exemptions to deaf mutes and insane and blind persons.—cumulative.

Homestead exemptions provided by Act 107, Special session 1936-37, Legislature of Alabama, is in addition to exemption to deaf mutes, insane and blind persons provided by Section 2 (f) General Revenue Act of Alabama, No. 194, General Acts of Alabama, 1935, p. 256.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date which I quote as follows:

"Under Section 2, Schedule F, of the Revenue Bill (HB 324) Regular Session of the 1935 Legislature, property of deaf mutes and insane and blind persons are exempt to the extent of \$1200.00 taxable value on their real estate.

"Please advise me if such a person who owns and lives in his home is entitled to homestead exemption in addition to exemption already allowed."

It is my opinion that the homestead exemption from State taxes authorized by Act No. 107, Special Session of the Legislature, 1936-37, is in addition to the exemption to deaf mutes, insane and blind persons which is authorized by Section 2 (f) Revenue Act of Alabama, General Acts, 1935, p. 256. Section 2 (f) reads as follows:

"The property of deaf mutes, insane and blind persons to the extent of \$2,000."

The exemption in Section 2 (f) is not restricted to homesteads nor is it restricted to any particular class of property. It may be real or personal. The fact that a homestead is exempted would not prevent application of Section 2 (f) to some other class of property, which the deaf mute, in-

sane or blind person owns. There is nothing in the Homestead Exemption Act which evidences an intention on the part of the legislature for the homestead exemption to be a substitute for the exemption granted under Section 2 (f).

It is my opinion that the two exemptions both may apply to a homestead, or that the homestead exemption may apply to a homestead and the other to other property belonging to the beneficiary of the exemption. The eligible beneficiary under Section 2 (f) might not own a homestead. If I should hold that it was the intention of the legislature to substitute a homestead exemption for the exemption granted in Section 2 (f), the latter exemption might be denied.

I therefore conclude that the exemptions are cumulative and that the eligible beneficiary in Section 2 (f) is entitled to homestead exemption of \$2,000 and a property exemption of \$1200.00 on his homestead if he elects that the latter exemption be so applied.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 8, 1937.

Hon. O. S. Nichols,
Tax Assessor, Perry County,
Marion, Alabama.

Taxation—Homestead Exemptions—

Each joint owner is entitled to his proportionate share of exemption on homestead.

Joint owners of land who own separate residences thereon are entitled to proportionate share of exemption on homestead.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

This is to acknowledge your letter of June 11th which is as follows:

"Please give us your opinion and ruling at once on the following, as we are handling the Homestead exemption forms required to be filled out and we are at a loss to know just what amount of exemption to allow in the following cases.

"1. When two brothers own a house and lot in town, and the property is jointly owned and assessed to both of them, say Tom and John Smith, and one of the brothers lives in the house which is his homestead, and the other brother lives out of the state. The property owned jointly is assessed for \$2000 and Tom Smith, the one that lives in the house comes in the assessor's office to file claim for homestead exemption. Can Tom claim the full amount of \$2000 exemption, or is he entitled to claim just his one-half interest in \$2000 which would be \$1000 and how would we write up the exemption claim.

"2. We also have another case on assessment where two sisters and a brother own a house and lot in town, and it is assessed in the

name of the three as follows, Bettie Gulley, Lal Caldwell, and Robert Redding. Now in this case the brother and one sister live in the house as their homestead and the other sister lives out of the State. This piece of property is assessed for \$1800. Mr. Redding who acts as agent for the three, comes in to file claim for homestead exemption. Who and how many of them are entitled to claim exemption and what amount can be allowed for homestead exemption?

"3. We have two brothers who own 80 acres of land jointly, and both of them live on the land each owning his own house, they own the 80 acres undivided, but own their houses separately. This property is on assessment in both of their names as owner, just how can they claim homestead exemption, say the land is assessed for \$400 and each of their houses is assessed for \$200, each making the total assessment \$800. Are they entitled to the full \$800 exemption, and would the claim be written up as assessed in both of their names or would we have to make separate forms for each of them, there is only one assessment so you could hardly make two forms.

"4. We have five sisters who are heirs of their father's estate which is 160 acres and improvements all assessed for \$2000 and just one of the sisters who is a one-fifth owner of this property lives on this property as her homestead, the other four are out of the state. Just how must this case be handled when the sister that lives on the property and acts as agent for the estate comes in to claim exemption. She naturally expects to claim and get the full amount of \$2000 for homestead exemption. Please state plainly what amount she can claim and whether any other of the heirs can likewise claim any portion.

"5. How would an estate of this kind be handled? We have an assessment as follows. J. Freeman Suttle, Jr., Exct. for Estate of J. Freeman Suttle, deceased. The widow of Mr. Suttle is living in the house formerly occupied by her and Mr. Suttle, and one of the sons and his family live with his mother, and two other brothers live on the lands of the estate in separate houses. This estate is not divided to the heirs it stands all together, and is quite a large estate. Now how could homestead exemption be claimed in this case and what would be the limit of the exemption, meaning can more than one of them claim exemption.

In reply to your question, I refer you to the case of **Alabama Power Co. vs. Cornelius**, 211 Ala. 245, 100 So. 207, wherein it is held:

"While tenant in common is entitled to homestead exemption, each owner cannot claim full exemption to joint property which is not increased because of their fractional interests so as to make up in quantity what is wanting in extent of ownership."

Fuller vs. American Supply Co., 185 Ala. 512, 64 So. 549, in discussing homesteads, holds:

"Occupancy is essential to the privilege of homestead exemptions extended by the Constitution and laws of the state to town lots and country acres owned and occupied by residents."

All property owned jointly or severally should be listed in the name of all the owners.

In reply to your first question, I am of the opinion that only the joint owner who actually resides on the property claimed as a homestead

is entitled to exemption. He should be allowed his proportionate share of the \$2000 exemption, or \$1000.

In reply to your second question, I am of the opinion that the two joint owners who actually reside on the property claimed as a homestead are entitled to their proportionate share of the homestead exemption, or \$600.00 each. The third joint owner who does not reside on this homestead is not entitled to such exemption.

In reply to your third question, I am of the opinion that each of the joint owners of the 80 acres of land who owns his own home thereon, is entitled to claim exemption on his home and his proportionate part of the 80 acres. Each can claim not exceeding \$1000 exemption.

This is in reply to your fourth question. As only one of the five joint owners, in the instant case, resides on the property, I am of the opinion that only she is entitled to claim her proportionate part of the exemption which is \$400.

This is in reply to your fifth question. Whether or not the widow is entitled to homestead exemption will depend upon the will of the deceased. If you will let this office have a copy of the will, I shall be glad to see that you receive an official opinion, regarding this point, as soon as possible.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 21, 1937.

Hon. Frank M. Julian,
Superintendent of Insurance,
Capitol,
Montgomery, Alabama.

Acts 1936-1937, page 221, Amending Section 2, of Act of July 30, 1931, Acts 1931, page 819, so far supersedes the provisions of Section 2 of the 1931 Act as to make the provisions thereof, as amended by the latter act, effective from and after March 3, 1937.

Dear Sir:

I wish to acknowledge further receipt of your inquiry stating that a life insurance company organized under the laws of the State of Louisiana had made application for admission to do business in the State of Alabama and desired to write in this State the so-called contingent mortality endowment contracts such as are dealt with in the act approved July 30, 1931, Acts 1931, page 819, and that that company desired to fill groups which it had opened subsequent to July 30, 1931, and prior to March 3, 1937, and asking my opinion upon the following question:

"Whether the act approved March 3, 1937, General Acts Extra Session 1936-1937, page 221, amending Section 2 of the Act of July 30, 1931, Acts 1931, page 819, so far repeals Section 2 of the Act of 1931 as to permit foreign companies upon qualification to do business in Alabama subsequent to March 3, 1937, to write such contingent

mortality endowment contracts in groups which actually contained subsisting policies or certificates prior to March 3, 1937.

Examination of the 1931 Act discloses that the prohibition there laid against the further establishment of new divisions or classes and in effect confining the indicated companies to the writing of such policies in or placing such policies in divisions or classes then actually containing subsisting policies or certificates by its terms applies to any such companies "operating in this State". The status of foreign companies with reference to the intended operation of this statute was left in considerable doubt. No express provision was made in that act with reference to any foreign company which might thereafter qualify, although it may have had in existence any number of classes or divisions containing policies or certificates prior to July 30, 1931.

It appears that the Act of March 3, 1937, General Acts Extra Session 1936-1937, page 221, provided that Section 2 of the Act of 1931 "be and the same is hereby amended so as to read as follows" and thereafter set out the exact language of Section 2 of the Act of 1931 with the following addition at the end: "Any foreign life insurance company, mutual aid association, or fraternal benefit society, order or association, now doing business in this state, or hereafter qualifying or becoming licensed in this state, shall be permitted to operate on this plan upon the same conditions."

It will also be observed that the language of Section 2 of the 1931 Act as rewritten in the Act of March 3, 1937, is in pertinent part as follows: "A life insurance company, mutual aid association, or fraternal benefit society, order or association heretofore operating on this plan in this state may continue to do so upon condition that such life insurance company, fraternal benefit society, or mutual aid association shall **not hereafter establish its policyholders or members into divisions or classes other than the divisions or classes actually containing subsisting policies or certificates when this act shall become a law; * * *.**"

It appears to me that this statute having been completely rewritten in every respect by the Act of March 3, 1937, that such later enactment should be deemed a complete revision and repeal of the section as it existed at that time for the purposes of the present inquiry.

Allgood v. Sloss-Sheffield Steel & Iron Co., 196 Ala. 500.

State v. Kirpatrick, 19 Ala. Appeals 50.

Killians v. Hancock, 203 Ala. 570.

Fidelity & Deposit Company of Maryland v. Farmers Hardware, 136 So. 824.

It therefore appears that the clause "when this act shall become a law" contained in the statute as amended by the Act of March 3, 1937, must be deemed to refer to the date of that amendatory act, and to make the requirements therein contained effective from that date forward. Therefore, it appears to me to be the meaning of this amendment that such foreign companies may be properly qualified and licensed to do business in Alabama, upon complying with all other requirements of the law, and that they may write such contingent mortality endowment contracts and classify them into divisions or classes which contained subsisting policies

or certificates prior to March 3, 1937, but may not write or issue such policies or contracts in or allocate them to divisions or classes which did not contain subsisting policies or certificates prior to March 3, 1937.

Yours very truly,

A. A. CARMICHAEL,
Attorney General,

July 26, 1937.

Dr. J. A. Keller,
Superintendent of Education,
State of Alabama,
Montgomery, Alabama.

Boards of Education may make lease for bus bodies and chassis extending over a period beyond the current year, provided Board of Education is not legally bound to continue payments beyond current year.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 4, 1937, in which you request my opinion as follows:

"Many boards of education are desirous of improving their transportation facilities immediately. Many dangerous, homemade wooden school bus bodies are being used in the transportation of school children.

"County boards of education are given an annual allotment from the Minimum Program Fund for the purpose of providing for school transportation. These funds are not sufficient in any one year for a school board to purchase new busses and chassis outright. However, if an arrangement could be made whereby these boards could obtain bus bodies on a lease rental contract for a period of from three to four years, the ownership of the busses to pass into the hands of the board of education at the end of this period, better equipment would be made available at once. I am, therefore, requesting your opinion concerning the following:

"1. Is it legal for boards of education to acquire bus bodies and chassis by means of a lease rental contract extending over a period of from three to four years, the ownership of these busses to be transferred to the board of education at the expiration of the lease rental period?

"Permit me to call your attention to the following act which has a bearing upon this point:

"Section 5 of Act No. 300, approved September 2, 1935, provides that budgeted expenditures in any year may not exceed budgeted income plus balances on hand for that year. It would seem that the plan referred to above would not violate this provision, provided that the lease rental contract in any year, taken together with other expenditures of the school system, does not exceed the anticipated income for that year.

"Section 9 of Act No. 300 provides that current loans made by boards of education must be repaid within the fiscal year in which made. If a lease rental contract of the nature described above is interpreted as a current loan, evidently my question must be answered in the negative. However, it is possible for boards of education to acquire school busses on a lease rental contract and operate such busses over a period of four years on practically the same money as would be necessary to pay contractors to transport the school children in privately owned busses. Under a lease rental contract the board of education would not obligate itself in the same manner as it would if it pledged future revenues on current loans which would make such revenues unavailable for the operation of schools in future years.

"2. Is it legal for boards of education to rent or lease school busses and chassis for a period of from three to four years with the option of purchasing such busses for a nominal sum at the end of such lease or rental period? Act No. 300 referred to above has a direct bearing upon this question also.

"May I urge that these questions be answered at the earliest possible moment for the reason that several boards of education are awaiting answers to them before acting upon this matter."

Your first inquiry is whether it is legal for boards of education to acquire bus bodies or chassis extending over a period of from three to four years, the ownership of these busses to be transferred to the board of education at the expiration of the lease rental period. The proper answer to this question depends somewhat upon the type of instrument and the exact terms of the instrument contemplated by you. Act No. 300 of the Acts of 1935, page 728, requires the establishment of a budget system for each county and city school system of the State. Section 5 requires that the budgeted expenditures not exceed budgeted income. Section 7 limits the actual expenditures to the budgeted expenditures except under certain prescribed conditions of emergency. Section 8 requires that actual expenditures not exceed actual income plus balances on hand. Section 9 gives the county board of education authority to borrow money on the credit of the school fund to meet the salaries of teachers and other current expenses when the current funds on hand are not sufficient to meet the same, and as security therefor, to pledge the current revenues of the current fiscal year. It is expressly provided that "all such current loans shall be due and payable not later than the end of that fiscal year. * * * At no time shall loans be secured or certificates be issued for current expenses for any year which shall pledge school revenues of any other fiscal year. The amount which is borrowed either by loan or certificate of indebtedness shall at no time exceed one-third of the sum paid for all current expenses including teachers' salaries during the preceding school year. Boards of education shall have authority to pay interest at the rate of not exceeding 6 per cent per annum on such loans or such certificates of indebtedness as may be issued."

The ordinary lease sale contract, in my opinion, would not constitute a loan as referred to in Section 9 of the Act. See **Commercial Credit Company v. Tarwater**, 215 Ala. 123, 110 So. 39. If the lease contract is so drawn that the county board of education is obligated to pay the full amount of the contract over a period of four years, it may violate the other provisions of Act No. 300 above set out. On the other hand, if the lease contract is so drawn that at any time the board of education fails to meet the payments of rental, all rights and liabilities under the contract cease, in my opinion, such a contract would be legal and would not vio-

late any of the provisions of the Act above referred to. In this connection, I refer you to the opinion to Hon. W. M. Vaughan set out in Vol. V, Quarterly Report of Attorney General, page 26, in which an analogous arrangement for the purchase of a jail was approved by this office.

I believe the answer to question 1 above referred to also answers your second question. If the contract of lease binds the county board of education to pay an amount three or four years in the future, in my opinion, it would be prohibited by the Act above referred to. On the other hand, the inclusion of an option to purchase at the end of four years would not make illegal a lease contract under which the county board of education is not obligated beyond the current year.

Yours very truly,

A. A. CARMICHAEL,
Attorney General,

July 27, 1937.

Hon. W. L. Little, Supt.,
Cherokee County Board of Education,
Center, Alabama.

Deputy Solicitor of County may receive pay allotted by United States Government for services in negotiating loan for school building under P. W. A.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter in which you state:

"Recently the Cherokee County Board of Education negotiated a loan with the Federal Government under the Public Works Administration to construct certain school buildings situated in this county. In negotiating this loan it was necessary that the Board of Education be represented by an attorney and in the estimate furnished the government the sum of \$300.00 was allotted for legal services.

"The County Board of Education employed Mr. Irby A. Keener of Center, Alabama, as its attorney in this matter. Mr. Keener is deputy solicitor in and for Cherokee County, Alabama. Please advise if I am authorized to pay Mr. Keener a fee for his services rendered in this matter."

I am of the opinion that Mr. Keener may be paid for his services in accordance with allowance made by the United States Government.

It was no part of Mr. Keener's duties as Deputy Solicitor of Cherokee County to perform services for the Board of Education in the manner set forth. The duties of a Deputy Solicitor, as provided by Section 5522 of the Code are:

"* * * to represent the state in all cases in the county court and inferior courts, and all preliminary proceedings, applications for bail and habeas corpus proceedings in all courts, aid or act for the circuit solicitor before the grand jury and in all matters in the circuit court

"when requested to do so by the circuit solicitor, and perform all the duties of the circuit solicitor in his absence when so directed by the circuit solicitor, * * *"

This Department has held in an opinion to the Superintendent of Education of Fayette County, Alabama, May 8, 1930, and in opinion cited therein, that a County Board of Education may employ counsel in certain matters. As the Board has authority to employ an attorney and as the services rendered are not included in the duties of the Deputy Solicitor, he may be paid for these services, in accordance with allowance made.

Section 5024 of the Code of 1923 does not prohibit this employment, as that section has reference only to employment by a county. Public schools have been held to be state agencies, (see *State v. Tuscaloosa County*, 233 Ala. 611, 172 So. 892) and therefore the employment here mentioned does not, in my opinion, violate this section.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

July 27, 1937.

Hon. S. G. Johnson,
Judge of Probate,
Lamar County,
Vernon, Alabama.

House Bill 383 (Acts No. 196, General Acts 1936-37, p. 227), applicable only to Lamar and Fayette Counties—a local law and not validly passed.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of March 29, 1937, in which you request my opinion as follows:

"Please advise if House Bill (H. 388, Hollis & Hodge), applying to Lamar and Fayette Counties only, is a valid law.

"It appears to me to be a local bill, and it wasn't advertised, and then it appears to have some other invalid provisions."

The Act referred to in your letter provides for the regulation of the use, distribution and expenditure of the proceeds of the Gasoline Tax Fund in all counties in the State of Alabama "with a population of not less than 17,800 nor more than 19,300 according to the last or any subsequent Federal Census."

It has been many times decided by the Supreme Court that population classification made the basis for enactments would be sustained in cases where there is a substantial difference in population and the classification is made in good faith, reasonably related to the purpose to be effected and to the difference in population which forms the basis thereof and not merely arbitrarily. Acts passed as general laws, based upon such population classification, and meeting this test, are valid in that

respect, although at the time of their enactment they can and do apply only to one county in the State. *Wages v. State*, 141 So. 707, *State v. Gullatt*, 210 Ala. 452, 98 So. 373, *Board of Revenue of Jefferson County v. Huey*, 195 Ala. 83, 70, So. 744; *Ward v. State*, 224 Ala. 242, 139 So. 416; *State v. Henry*, 224 Ala. 224, 139 So. 278. The only question, therefore, is whether there is a substantial difference in population and the classification is made in good faith, reasonably related to the purpose to be effected.

In passing upon this question, the court indulges all presumptions and intendments in favor of the constitutionality of the Act and will accord to the law-making body of the State Government sincerity of purpose and fairness in dealing with the people of the State. It will not be assumed that the population classification was arbitrarily fixed, but will rather be presumed that the Legislature's action was fairly taken for the purpose of meeting conditions that it honestly thought existed. *Wages v. State*. 141 So. 711.

Even allowing all presumptions and intendments in favor of the constitutionality of the Act, it is my opinion that this Act is a local law. There is no reasonable relation between the difference in population provided in the Act and the purpose to be effected, that is, the distribution and expenditure of the gasoline tax fund. In my opinion, therefore, this Act fails to meet the test prescribed by the Supreme Court and is a local law. Since such Act was not advertised as required by the Constitution, in my opinion it is unconstitutional.

Yours very truly,

A. A. CARMICHAEL.

Attorney General,

July 27, 1937.

Hon. Wm. O. Baldwin, Chairman,
Alabama Alcoholic Beverage Control Board.
Montgomery, Alabama.

Alabama Beverage Control Act—

1. Continuous shipment through Alabama of consignment of liquors originating in one state or a foreign country for delivery to a point of destination in another state, which involves only such removal from carrier as is presently necessary to effect delivery in the usual expeditious course of transportation, and which does not involve storing and warehousing in Alabama pending the finding of purchasers or the receipt of orders or instructions for future shipment to purchasers, is not prohibited by law in Alabama.

2. The Alabama Alcoholic Beverage Control Board is authorized to promulgate rules and regulations permitting importation and storing in Alabama of liquors by persons, firms or corporations if the importation and storage of the liquor is incident to sale or resale in interstate commerce.

3. Persons, firms or corporations are authorized to import and store liquor in Alabama subject to the control of the Alabama Beverage Control Board, if such importation and storage is incident to sale or resale in interstate commerce.

Opinion by the Attorney General.

Dear Sir:

I have your request for opinion as follows:

"Inasmuch as the Alabama Alcoholic Beverage Control Board is desirous of aiding all Alabama Industries, and inasmuch as there appears to be a certain amount of business which might accrue to the Alabama State Docks by the importation of liquor through the port of Mobile we would appreciate your opinion as to whether or not the obstacle brought out in Mr. Jones' letter, which is transmitted herewith may be overcome so that the Alabama State Docks and the port of Mobile might get the benefit of such business as will accrue as a result thereof."

The letter of Page & Jones, referred to in your request presents three questions, namely:

1. Is the continuous shipment through Alabama of a consignment of liquor originating in one State or in a foreign country for delivery in another state which involves only such removal from vehicles of the carriers as is necessary to effect usual expeditious transportation to point of destination, violative of Alabama law?
2. Is the Alabama Alcoholic Beverage Control Board authorized to promulgate regulations under which persons, firms and corporations may import into and store in the State of Alabama liquor for sale or resale in interstate commerce?
3. Does the Alabama Beverage Control Act permit any person, firm or corporation to import into and store in the State of Alabama liquor for sale or resale in interstate commerce?

The matters of your inquiry are difficult of determination due to the many conflicting and confusing provisions of the Alabama Beverage Control Act.

I am of the opinion that your first inquiry should be answered in the negative.

The Supreme Court of the United States in the case of **State Board of Equalization v. Young's Market Company, et al**, 81 L. Ed. 37, in construing Section 2 of the 21st Amendment to the Constitution of the United States held that under said amendment a State had the power to prohibit under its police power any transportation or importation into said state of alcoholic beverages, which, of course, includes the right to regulate sale, use, consumption or handling of any such Beverages within its borders. But under said decision the 21st Amendment, *supra*, did not empower a state to regulate a continuous shipment of alcoholic beverages through a state from a foreign country or a state to another state.

In **Moragne v. State**, 200 Ala. 689, the Supreme Court had under consideration the effect of the prohibition laws of Alabama then (1919) in effect and of the Webb-Kenyon Act (U. S. Comp. St. 1916, Sec. 8739) as applied to the transportation of liquor through the State of Alabama from the State of Georgia into the State of Florida. The Court of Appeals had held that, notwithstanding that the shipment of liquors by automobile carrier was in continuous interstate commerce, the prohibition laws of Alabama operated upon the same, and that the appellant was properly

convicted of the violation thereof. In reversing the judgment of the Court of Appeals, the Supreme Court said:

"We are of the opinion that the Court of Appeals fell into error in so construing the state and federal statutes; that, if the facts were as stated by the Court of Appeals, then defendant was not guilty of the offense charged, because our state statutes in question do not apply, and were never intended to be applied, to such an interstate carrying or possession of such goods for the sole purpose of interstate transportation, nor was it the effect of the Webb-Kenyon Bill to extend our statutes to such cases. Were the holding of the Court of Appeals correct, then it would follow that there could not be an interstate shipment through this state along the public highways thereof from one person to another of more than two quarts of prohibited liquors, even though the shipping point and the point of delivery be in different states, and neither in this state.

"We are of the opinion that the statutes in question, whether jointly or severally considered, do not effect such a result, and were never by the lawmakers intended to apply to interstate shipment **where the liquors are merely passing through Alabama**, and are not bought, sold, stored, or possessed here, except as a necessary incident of transportation." (Italics supplied)

And upon a reconsideration of the case, *Moragne v. State*, 201 Ala. 389 the Court said:

"We think that these facts, if believed by the jury show that the shipment in question is an interstate one, notwithstanding it was by automobile and over the public highways of the State instead of by rail or boat (*Hannibal & St. J. R. Co. v. Husons*, 93 U. S. 465, 24 L. Ed. 527; *Kelly v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359), just as much so as would be a shipment from Louisville, Ky., to New Orleans, La., over the Louisville & Nashville Railroad, which passes through the State of Alabama. Of course, if there was such a break or disconnection in the shipment by removing it from the vehicle and storing it in this state, it would no doubt cease to be protected as an interstate shipment, and the state statute as well as the Webb-Kenyon law would apply to same." (Italics supplied)

Section 4717 of the Code of 1923, which was taken from Acts of 1919, page 6, Section 16, prohibited the transportation of liquors through this State except by railroad companies as common carries, etc. Without passing upon the doubtful constitutionality of this section because of its discriminatory provisions, I am of the opinion that said section was necessarily repealed by the enactment of the Alabama Beverage Control Act. Furthermore, in the Supreme Court case of *McCall v. State*, 232 Ala. 576, 169 So. 8, which held to the same effect as *Moragne v. State*, supra, this section was not considered.

From the foregoing, it is apparent that the State legislature does not have the power to enact legislation which would prohibit or, in any wise, hamper transportation of liquors through the State of Alabama and that the more temporary storing for future continuous transportation which is the most necessary and expeditious mode of transportation is not prohibited.

For convenience, your second and third inquiries will be answered jointly.

The method of doing business as outlined in the second and third inquiries, which allows an importation into and storage in Alabama of liquors there to rest to await future buyers or future orders for further transportation to said purchasers, (which includes only the Alabama Beverage Control Board insofar as purchasers in this State are concerned) in my judgment is clearly an importation into the State of liquors which may or may not be prohibited by the State legislature. The question then presents itself as to whether or not any existing laws of this State, including the Alabama Beverage Control Act, contain a prohibition against such importation.

To determine the above question, it is necessary to quote from the many conflicting and confusing provisions of the Alabama Beverage Control Act. For Example, Section 3 (c) of the Act provides as follows:

"Except as herein otherwise expressly provided, the purpose of this Act is to prohibit transactions in liquor and alcohol, and malt or brewed beverages, which take place wholly within the State, except by and under the control of the Board, as herein specifically provided, and every section and provision of this Act shall be construed accordingly. The provisions of this Act, through the instrumentality of the Board, and otherwise, provide the means by which such control shall be made effective. This act shall not be construed as forbidding, affecting or regulating any transaction which is not subject to the legislative authority of this State." (Italics supplied).

Section 54 of said Act provides as follows:

"Should the collections of any taxes under this Act be now or upon the passage of this Act prevented by the operation of the provisions of the Constitution of the United States, relating to interstate or foreign commerce, the Legislature hereby declares that should the Congress of the United States pass any legislation authorizing the taxation by the States of interstate or foreign commerce, sales shipment or receipts, or commodities transported therein, or receipts of sales therein, then the provisions of this Act shall apply to such sales, shipments or receipts as fully and completely as provided herein as to intrastate sales, shipments and receipts, to the extent that such Act and/or Acts of Congress authorizes and permits."

Section 6 of the Alabama Beverage Control Act provides as follows:

"The functions, duties and powers of the Board shall be as follows:

"(b) To control the possession, sale, transportation and delivery of alcoholic beverages as enumerated and defined herein.

"(i) To control the manufacture, possession, sale, consumption, **importation**, use and delivery of liquor, alcohol and malt or brewed beverages, in accordance with the provisions of this Act; and to fix the wholesale and retail prices at which liquor shall be sold at Alabama liquor stores. The Board shall require each Alabama manufacturer and each non-resident manufacturer of distilled liquors selling distilled liquors to the Board to make application for and be granted a permit by the Board before distilled liquors shall be purchased from such manufacturer. The Board before issuing such permit shall collect from each applicant permit fee of fifteen dollars (\$15.00), which sum shall be paid annually thereafter on application. In the event that any such manufacturer shall, in the opinion of the Board, sell distilled liquors to the Board through another person for the purpose of evading this

provision relating to permits, the Board shall require such person before purchasing distilled liquors from him, or it, to take out a permit and pay the same fee as hereinbefore required to be paid by such manufacturer. All permit fees so collected shall be paid into the State Stores Fund."

Section 19 (3) of the Alabama Beverage Control Act provides as follows:

"Only malt or brewed beverages as herein defined can be sold and/or distributed under licenses issued to any wholesaler, distributor and/or retailer of such beverages as enumerated and defined and licensed as such under this Act. All vinous beverages, whether or not manufactured within or without this State, can be sold by the manufacturers only to State Liquor Stores as herein defined. **All other alcoholic beverages will be manufactured, imported, sold and/or distributed by the Board through the State Liquor Store, in the manner prescribed in this Act.**" (Italics supplied)

The strict importation of liquors into Alabama generally is prohibited by the italicized portion of Section 19 (3), supra, but in my opinion such does not prohibit importation in the manner hereinabove set out. Said prohibition, in my judgment, is applicable only to liquors imported into this state for sale in this State and in such instance the importation must be for the sale to the State Liquor Store. Said prohibition, in my judgment was merely a safeguard passed by the Legislature to prohibit the individual resident of Alabama from buying liquor from out of state concerns and further to prohibit an out of state concern from importing and selling to an individual in Alabama intoxicating liquors. Said provisions could not affect an importation into Alabama when such importation is incident to interstate commerce in that it only rests in Alabama temporarily and is exported in the original unbroken packages. This is true although it may rest in Alabama temporarily and later resume its interstate movement. In this respect, I may state that since the Alabama Beverage Control Board is authorized to purchase liquors in Alabama, such importations into this State may be in the future sold or consigned to the Alabama Alcoholic Beverage Control Board.

Due to the purpose expressed in the title of the Act, which is to promote temperance and suppress the evils of intemperance in regard to alcoholic beverages, it is apparent that the Legislature did not intend to prohibit the above method of doing business as such would in no wise tend to in any way interfere with the main purpose of the Act.

Sub-section (1) of Section 6 as above quoted, gives to the Alabama Alcoholic Beverage Control Board the right to control the importation of liquors in this State. Furthermore, it is empowered to make rules and regulations in order to effectuate the purpose of the Act under Section 7 (a) of said Act. Considering these two sections in pari materia with the purpose of the Act, it is my opinion that the Alabama Alcoholic Beverage Control Board may make such reasonable rules and regulations in regard to the method of doing business as would effectuate the purpose of said Act.

To hold that the word "imported" as used in Section 19 (3) supra, applies only to liquors imported for sale in Alabama (other than to the Alabama Alcoholic Beverage Control Board) and that the "importation" as used in Section 6 (1), supra, applies to importation and storage in Alabama for said sale and delivery to non-residents and the Alabama Alcoholic Beverage Control Board, may at first seem inconsistent. However, in order

to effectuate the purpose of the Act (that is to promote temperance and suppress the evils of intemperance) this distinction is necessary. In one instance, the legislature prohibited the importation of liquors into Alabama other than through Alabama Beverage Control Board and in the other instance, allowed the Alabama Beverage Control Board to control such importation. In other words, the Alabama Beverage Control Board could not pass a rule and regulation authorizing the importation of liquors into Alabama other than to that body, whereas, on the other hand, it could and has the power to pass reasonable rules and regulations to control the importation of liquors which are to be later sold and delivered to parties without the territorial jurisdiction of Alabama and the Board itself. In one instance, the importation is for use within the state and the other instance is merely a part of the journey of the liquor involved, although it may come to rest in Alabama for such a length of time as to be classified as "importation".

The above is in accordance with the well-known rule of statutory construction that the intention of the legislature is oftentimes determined by the spirit and context of a statute considered as a whole rather than the particular wording or strict letter thereof. In this connection reference is made to the case of *City of Birmingham v. Southern Express Co.*, 168 Ala. 529, wherein the court stated:

"That construction of statutes is correct that gives to each the effect which the statute maker intended. The intent of the lawmaker is the law. Courts are to construe and interpret the meaning of statutes, and then declare the intent of the lawmaker, which is the law, if the meaning of the words or language used by the lawmaker is clear and certain, then there is no room or occasion for construction or interpretation. It is only when the meaning of the language and intent of the lawmaker is not obvious or certain that courts are needed or required to interpret. Where the meaning of the language used, or the intent of the lawmaker, rests in reference, then construction and interpretation are useful. If the meaning or the intent is obvious and clearly expressed, then it does not rest in reference. The clearly expressed meaning or intent must and should prevail, though others could be assigned. If one meaning be certainly expressed, and another left to inference, the one expressed should prevail.

"This rule of construction does not imply that the letter shall control the spirit. A thing may be within the letter of a statute and not within the meaning or spirit, or it may be within the clear meaning or spirit and not within the letter. Courts, in construing statutes, often look less to the letter than to the context, the spirit, or to the meaning of the statutes to arrive at the true intent of the lawmaker.

"Statutes are often drawn inartificially. Apt words are not always used, and perspicuity and precision are not always observed by those who draft statutes."

Also in *Nunez et al v. Borden*, 226 Ala. 381, the Court said:

"A statute should be given effect according to its purpose manifested by its language and other rules of construction. The court is often not controlled by the literal language of the statute, but by its meaning when properly interpreted, though outside of such literal meaning."

In my judgment these rules of construction, when applied to the whole of the Alabama Beverage Control Act lead to the conclusions as stated above.

The premises considered, your second inquiry is answered in the affirmative and your third inquiry is answered in the affirmative, subject to the conditions above set out, viz. subject to the Control of the Alabama Alcoholic Beverage Control Board.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

July 28, 1937.

Hon. J. A. Carnley,
Judge of Probate,
Coffee County
Elba, Alabama

Expense of conveying crippled children to hospital not a proper claim against the County but may be paid by Department of Education under Act of 1935, p. 807.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of July 14th, in which you request my opinion as follows:

"A claim is presented to the Court of County Commissioners for transportation charges for conveying back and fourth cripple children to hospital in Mobile, Alabama. As I do not find any law, which expressly authorizes the County to pay such expenses, I am hereby requesting your opinion, and will thank you for your promptness in this matter. Mrs. Mamie B. Hill, Public Welfare Director, has filed such claim for payment by our Commissioners Court."

I know of no law giving a Court of County Commissioners authority to pay the charges referred to in your letter. However, I call your attention to the Act of 1935, No. 398 (General Acts of 1935, p. 870), under which certain appropriations for the purpose of providing medical, surgical and other services, care and treatment of crippled children were made available and were required to be administered by the State Board of Education.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

July 28, 1937.

Hon. F. G. Hereford,
Sheriff, Madison County,
Huntsville, Alabama

Sheriffs—Expenses of returning prisoners charged with felonies a proper charge against the State and not the county, although such prisoners are convicted of a misdemeanor.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of July 21, 1937, in which you request my opinion as follows:

"The State examiners have charged me back with several cases in which I made trips to various cities and States for prisoners, charged with a felony.

"This expense has already been collected by me from the County. All of these cases as charged back by the examiner are supposed to have been paid by the State, which is correct so far as felony cases are concerned.

"The question that I wish settled is this. Most of these cases were tried and convicted of misdemeanors, several were nol prossed, one case was entered on the docket by the Court 'Improperly on the docket.' Another case where we went to Belton, Texas, for two prisoners and returned, at a cost of One Hundred Thirty Four and 15/100 Dollars. In this case, one of the defendants, Hargrove, was convicted and sentenced to the penitentiary for several years, and Busby, who was with him on a similar charge. In this case it was marked 'Improperly on the docket.' But this same party, Busby, was convicted of petit larceny, and sentenced to hard labor.

"Should the County pay one-half of this cost or should the State pay all of it?

"It looks as if the County should have to pay for all cases that were convicted of misdemeanors, and the other cases that were dismissed by the Court.

"The whole trouble with me is, if I should have to pay the County in all of these cases, or refund the money collected from the County and collect same from the State, and in the event the State failed to pay me, then who am I to look to for the expense of bringing these parties to trial?"

It seems, from your letter, that in each of the cases, the prisoner was charged with a felony. One of them was convicted of a felony, several were convicted of misdemeanors, while others were nol prossed. Your inquiry is whether under these circumstances any of the expenses of returning said prisoners is a proper charge against the county rather than against the State. In my opinion, all of said expenses are proper charges against the State and none of them is a proper charge against the county. Such expenses are governed by the provisions of Code Section 3749 and Code Section 3741. Section 3749 provides:

"3749. Expense of bringing back absconding felon on requisition; how paid. — Any sheriff or other person commissioned as agent of this state to receive from another state any prisoner for removal to this state to answer a charge of felony, is entitled to receive actual expenses and two dollars per day while going to and returning from the place where the prisoner is arrested or confined, to be paid, on the approval of the governor, as in other cases of removal of prisoners by sheriffs."

You will note that this section makes no reference to conviction of the prisoners or the disposal of the case, but is based entirely upon whether

the prisoner is charged with a felony. This section refers to Section 3741 for the manner in which the expenses are to be paid "as in other cases of removal of prisoners by sheriffs." The applicable portion of Section 3741 with respect to the fees of the sheriff for removing prisoners is "together with the actual necessary traveling expenses of himself or deputy, and guard or guards, and prisoner or prisoners while on the trip, by the nearest route usually traveled between the points from and to which such removal is made, to be paid by the State in case of felonies, and by the county when the offense committed is a misdemeanor, upon his sworn statement and account therefor, accompanied by a certificate of the clerk of the court in which the prisoner is or will be, triable, that such fees have been reported to and docketed, or will be docketed by him." The section further makes provisions for charging said costs to the prisoner if the prisoner is convicted.

The underlined portions of said section, together with the provision as to what shall happen if the prisoner is convicted, are incompatible with any holding other than that the right of the sheriff to the expense from the State or from the county is determined by the crime with which the prisoner is charged and not by the offense of which the prisoner is ultimately convicted. The provision as to certificate of the clerk recognizes that such account may be made out before trial and before the cause has been completely docketed by the clerk. In my opinion, therefore, these expenses are payable by the State where the prisoner is charged with a felony, although the prisoner may later be convicted of a misdemeanor or the charge may be nolle prossed. Compare the opinions in Quarterly Report of the Attorney General, Volume 6, page 17, Quarterly Report of the Attorney General, Volume 2, page 118, Question 29, and Biennial Report, 1932-34, page 381, holding that the amount of the sheriff's fee for making arrest is determined when the fee attaches, and if the prisoner is charged with the felony, the sheriff is entitled to the fee provided for arrests of felons, although the prisoner is later convicted of a misdemeanor.

It has also been held by this office that the county commissioners court is without authority to pay the sheriff for actual expenses for removal of prisoners charged with a felony to the county. Biennial Report, 1932-34, page 175; Biennial Report, 1932-34, page 12. In my opinion, therefore, all the expenses referred to in your letter are proper charges against the State and none of them is a proper charge against the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General,

July 29, 1937.

Hon. William O. Baldwin, Chairman
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama

Alabama Beverage Control Act—

1. Alabama Alcoholic Beverage Control Board has same jurisdiction in dry counties that it has in wet counties in regard to the enforcement of the regulatory and penal provisions of the Act.

2. The Alabama Beverage Control Act should be enforced in all counties, both wet and dry, by the State and Local Law Enforcement Authorities and by the Agents of the Alabama Alcoholic Beverage Control Board.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter in which you state:

"The Solicitor of a 'dry' county has reported to the Alabama Alcoholic Beverage Control Board that the Sheriff of his county has confiscated an automobile, in which was being transported liquor not bearing the identification mark of the Alabama Alcoholic Beverage Control Board."

You request my opinion as follows:

"(1) What jurisdiction has the Alabama Beverage Control Board in 'dry' counties?"

"(2) By whom should the Alabama Alcoholic Beverage Control Act be enforced in 'dry' counties."

"(3) In view of the fact that Section 51 of the Alabama Alcoholic Beverage Control Act provides that 'all laws prohibiting the manufacture and sale of alcoholic liquors or beverages now in force and effect in Alabama shall remain in full force and effect in every such ("dry") County,' is the Alabama Beverage Control Act in full force and effect in every 'dry' county as regards possession and transportation or are the present existing prohibition laws effective as regards transportation and possession as well as the manufacture and sale of such alcoholic beverages, either contraband or bearing the Alabama Alcoholic Beverage Control Board identification mark?"

Sacrificing brevity for clearness, we will set out in extenso a number of provisions of the Alabama Beverage Control Act which are pertinent to the matters contained in your letter of inquiry. These provisions are as follows:

Subsection (c) of Section 3:

"(c) Except as herein otherwise expressly provided, the purpose of this Act is to prohibit transaction in liquor and alcohol, and malt or brewed beverages, which take place wholly within the State, except by and under the control of the Board, as herein specifically provided, and every section and provision of this Act shall be construed accordingly. The provisions of this Act, through the instrumentality of the Board, and otherwise, provide the means by which such control shall be made effective. This Act shall not be construed as forbidding, affecting or regulating any transaction which is not subject to the legislative authority of this State."

Section 5 reads in pertinent part as follows:

"The Administrator, with the approval of the Board, shall appoint all necessary clerks, stenographers, inspectors, and chemists and other employees to properly enforce the provisions of this Act.

"The Administrator, with the approval of the Board, shall fix the duties, salaries and wages of all employees authorized by this Act.
* * *,"

Section 6, which is the Section setting out generally the functions, duties and powers of the Board, provides in pertinent part as follows:

"(b) To control the possession, sale, transportation and delivery of alcoholic beverages as enumerated and defined herein."

"(i) To control the manufacture, possession, sale, consumption, importation, use and delivery of liquor, alcohol and malt and brewed beverages, in accordance with the provisions of this Act; * * *"

Subsection (9) of Section 24, which is the Section entitled "Unlawful Acts" provides that it shall be unlawful:

"(9) For any person to manufacture, transport or import any vinous and/or malt or brewed beverages into this State, except in accordance with the rules and regulations of the Board, or for any person to transport vinous and/or malt or brewed beverages into or within this State unless there shall be affixed to the original container in which such vinous and/or malt or brewed beverages are transported, stamps, crowns or lids evidencing the payment of the vinous and/or malt tax to the State. Provided, however, that this clause shall not be construed to prohibit transportation of vinous, and/or malt or brewed beverages through this State and not for delivery therein if such transportation is done in accordance with the rules and regulations of the Board."

Subsection (3) of Section 25 reads:

"Transportation in Original Packages: It shall be unlawful for any licensee or transporter for hire to transport any vinous and/or malt or brewed beverages except in the original containers. It shall be unlawful for any transporter for hire to transport any vinous and/or malt or brewed beverages within this State unless such transporter shall hold a permit issued by the Board and shall have paid to the Board a permit fee, not exceeding One Hundred (\$100) Dollars."

Sections 33 and 34 of the Act set out the commodities subject to confiscation under the Act, and Section 35 provides the procedure to be followed for the confiscation of such commodities.

Section 33 provides that the commodities subject to confiscation under the Act that are "found at any point within the State of Alabama" shall be confiscated in the manner provided in the Act.

Section 37 provides as follows:

"Section 37. All 'Common Carriers,' contract carriers, buses and trucks transporting alcoholic beverages enumerated and defined herein, may be required under regulations to be prescribed by the Board to transmit to said Board a periodic statement of such consignments or deliveries of alcoholic beverages as enumerated and defined herein, showing date, point of origin, point of delivery and to whom delivered, and time of delivery, and all common carriers, buses, or trucks shall permit the examination by the Board, or its agents, of their records relating to shipment or receipt of alcoholic beverages enumerated and defined herein. Common carriers, buses and trucks shall permit examination of their records of shipment or receipts relating to alcoholic

beverages enumerated and defined herein when and where investigation made by the Board of its agents may deem it advisable and necessary to the enforcement of this Act. Inspectors, stamp deputies and other duly authorized agents of the Board, on proper identification from an authorization by the Board, shall make such examination.

"Any person, firm, corporation, partnership or association of persons, who refuses to transmit to the Board the statements hereinabove provided for, or who refuses to permit the examination of his records by the Board, or its duly authorized agent, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than One Hundred (\$100.00) Dollars nor more than Five Hundred (\$500.00) Dollars for such offense."

Section 48 provides as follows:

"Section 48. Powers of the Board:—The Board shall administer and enforce the taxes imposed by this Act; it shall have the power to enter upon the premises of any taxpayer and to examine, or cause to be examined by any agent or representative designated by it for that purpose, any books, papers, records or memoranda, etc., bearing upon the amount of taxes payable, and to secure other information directly or indirectly concerned in the enforcement of this Act."

Section 49 reads as follows:

"Section 49. Any person, firm, corporation, club or association of persons, who purchases, and/or receives, and/or who brings into the State in any manner whatsoever, any of the articles of alcoholic beverages enumerated herein, which does not have affixed revenue stamps, crowns or lids, or stamps or identification as described in this Act, shall within three (3) days of the receipt of such articles of alcoholic beverages, report the receipt or purchase of said alcoholic beverage to the Board, giving the date of purchase or receipt, the name of person or firm from whom purchased or received, and a list describing the articles of alcoholic beverages so purchased or received. This report must be made by registered mail, or in person. Any person, firm, corporation, club or association of persons who fails and/or refuses to make the report as required in this subsection, shall be guilty of a misdemeanor and upon conviction shall be fined not less than Five (\$5.00) Dollars, nor more than One Hundred (\$100.00) Dollars, or imprisoned not to exceed thirty days for each offense."

Section 51 in pertinent part reads as follows:

"In all dry Counties, as defined in this Section the Statutes of Alabama prohibiting the manufacture, sale or distribution of Alcoholic Beverages shall remain in full force and effect, and any person, firm, or corporation convicted of violating any of the provisions of the present statutes of Alabama regulating or defining the illegal manufacture, sale or distribution of alcoholic beverages shall be punished as now provided by such laws.

"In all Counties of the State it shall be unlawful for any person, firm or corporation to have in his or its possession any still or apparatus to be used for the manufacture of any alcoholic beverage of any kind, or any alcoholic beverage of any kind illegally manufactured, or transported, within the State, or imported into the State from any other place without authority of the Alcoholic Control Board of the State, and any person, firm or corporation violating this pro-

vision or who transports any illegally manufactured alcoholic beverages, or who manufactures illegally any alcoholic beverages, upon conviction shall be punished as now provided by law."

Section 52 reads as follows:

"Section 52. Unlawful to Sell Alcoholic Beverages In Dry Areas:— It shall be unlawful to sell alcoholic beverages within any county where the electors have voted against such sales except as authorized by Section 18 herein."

Section 53 in pertinent part provides as follows:

"Section 53. The Board is hereby authorized to employ such clerical assistants, field agents, inspectors and chemists as may be necessary to carry out, enforce and administer the provisions of this Act:
* * *"

Section 56 provides as follows:

"Section 56. It shall be unlawful for any person, firm or corporation to receive in this State any shipment of any of the articles taxed herein without the stamps, crowns or lids, as required by this Act, and knowing the same to be without stamps, crown or lids, for the purpose and intention of violating the provisions of this Act, and to avoid payment of the taxes, such person, firm or corporation shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than Twenty-five (\$25.00) Dollars, or sentenced to jail for not less than thirty (30) days or more than sixty (60) days either or both. Provided that in the event this provision shall be declared unconstitutional by the Courts, it shall not affect the remaining section."

It can be clearly seen from the above quoted provisions of the Act (and there are other provisions of like import) that the Alabama Alcoholic Beverage Control Board is charged with the duty of enforcing the provisions of the Act and that there are a number of provisions thereof which could not be adequately and properly enforced by the Board unless it had jurisdiction in the dry counties of the State as well as the wet counties of the State in regard to the enforcement of the same. Therefore, it is my opinion that the Alabama Alcoholic Beverage Control Board has the same jurisdiction in dry counties that it has in wet counties in regard to the enforcement of the regulatory and penal provisions of the Act.

In so holding, I am not unmindful of the provisions contained in Section 51 of the Act as follows:

"In every County where a majority of the electors voting in said election vote 'Yes', this Act, and all of its provisions, shall be immediately put into operation in such County but in every County where a majority of said electors voting in said election vote 'No', this Act shall not go into effect in such County, and all laws prohibiting the manufacture and sale of alcohol, liquor or beverages now in force and effect in Alabama, shall remain in full force and effect in every County."

However, this office has previously held in an opinion to Hon. E. Dick Burrows, Sheriff, Walker County, Alabama, dated April 3, 1937, that alcoholic beverages, including liquor, legally purchased in a wet county, could be legally possessed for personal use in a dry county, notwithstanding the

above quoted provisions of Section 51 of the Act. The holding of that opinion, as well as the holding hereinabove announced, was reached after a careful consideration of the whole context of the Act. When the whole context of the Act is considered, it is apparent that the above quoted provision of Section 51 of the Act, to the effect that this Act shall not go into effect in the dry counties, cannot be literally construed. If it were so literally construed, it would not give effect to the intention of the Legislature as expressed in the whole context of the Act. The intention of the Legislature embodied in a statute is the law. It is the fundamental rule of statutory construction, to which all other rules are subordinate, that the courts shall, by all aids available, ascertain and give effect to the intention or purpose of the Legislature as expressed in a statute, unless it is in conflict with the constitutional provisions or is inconsistent with the organic law of the State. 59 C. J. 948, *Street v. Cloe*, 207 Ala. 631, 93 So. 591. The declared purpose of the Alabama Beverage Control Act is, as expressed in the first clause of the title thereof, "To promote temperance and suppress the evils of intemperance." If the Alabama Alcoholic Beverage Control Board did not have jurisdiction in all counties of the State, both wet and dry, to enforce the regulatory and penal provisions of the Act, then this purpose of the Act "to promote temperance and suppress the evils of intemperance" could not be carried into effect by the Board in those parts of the State where it had no jurisdiction. In order that this declared purpose may be carried out by the Board, which is charged by the Act with the duty of enforcing it, it is essential that the Board have jurisdiction in both wet and dry counties in the State in regard to the enforcement of the regulatory and penal provisions of the Act, as I have hereinabove held it to have.

This holding is in accordance with the holding of the Supreme Court of Florida in the case of *McLeod v. Sebring*, 173 So. 153, on March 11, 1937, holding that the provisions of Chapter 16774, Acts of 1935, Laws of Florida (which are analogous to the provisions of our Alabama Beverage Control Act) were in full force and effect in dry as well as wet counties in the State of Florida.

Answering your question as to who should enforce the Alabama Beverage Control Act in the dry counties, it is my opinion that the Alabama Beverage Control Act should be enforced in dry counties, as well as wet counties, by the Agents of the Alabama Alcoholic Beverage Control Board and the duly constituted State and Local Law Enforcement Authorities. That the Agents of the Alabama Alcoholic Beverage Control Board have the authority and are charged with the duty of enforcing the provisions of the Alabama Beverage Control Act can be seen from the above quoted provisions of the said Act and the discussion hereinabove in answer to your first inquiry. Since, as I have held hereinabove, the Alabama Alcoholic Beverage Control Board has jurisdiction in dry counties as well as wet counties in regard to the enforcement of the regulatory and penal provisions of the Alabama Beverage Control Act, it follows that the Agents of the Board have the authority and are charged with the duty of enforcing these provisions of the Act in both the wet and dry counties of the State. The duly constituted State and Local Law Enforcement Officers likewise have the authority and are charged with the duty of enforcing these provisions of the said Act under their general authority and duty to enforce all criminal laws of the State of Alabama.

Your third inquiry is answered by the opinion of this office to Hon. E. Dick Burrows, Sheriff of Walker County, referred to hereinabove, a copy of which is enclosed for your information.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

July 29, 1937.

Honorable D. E. Dunn,
Assistant Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

1. Unstamped and/or unidentified alcoholic beverages, i. e., alcoholic beverages not sold in accordance with the provisions of the Alabama Beverage Control Act, and vehicles used for the transportation of the same, are subject to confiscation under the provisions of Sections 33, 34 and 35 of the said Act, in either a wet or dry county, these provisions of the said Act being applicable in all counties of the State.

2. Stamped and/or identified alcoholic beverages, i. e., alcoholic beverages originally purchased in accordance with the provisions of the Alabama Beverage Control Act, which are being illegally sold or kept for sale, and vehicles used for the transportation of the same for such illegal purposes, should be condemned in accordance with the provisions of the appropriate sections of Article 11 of Chapter 167 of the Code of Alabama, 1923, in either a wet or dry country, the said sections of the old prohibition laws not having been repealed in this respect by the provisions of the Alabama Beverage Control Act.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 11, 1937, in which you request my opinion as follows:

"Section 35 of the Alabama Beverage Control Act sets out the procedure when goods are confiscated under the Act, and, in so doing, apparently requires an appraisal of the goods, the posting of notice to any claimant of the goods, and authorizes any such claimant to file a bond for the goods with the Board, after which, the Board shall deliver the bond, with duplicate lists or description of the goods seized, to the Solicitor of the Circuit Court in the County in which the seizure was made.

"Sections 4779 and 4780 of the 1923 Code of Alabama provide for condemnation proceedings of any vehicle seized for transporting prohibited liquors or beverages, and for execution of bond by any claimant.

"The question has arisen whether or not the Solicitor of the Circuit Court of a county in which an automobile is seized has the right to proceed with condemnation proceedings under Sections 4779 and 4780 without first having the vehicle appraised, as provided in Section 35, and without first having the notices published, as provided in Section 35. We would like the following questions answered:

"1. Does Section 35 cover the procedure for sale of confiscated automobiles or vehicles?

"2. Does the Solicitor of the Circuit Court of a county in which the vehicle is seized have the right to proceed with confiscation proceedings without first having the automobile appraised, and notices

published, as required in Section 35 of the Alabama Beverage Control Act?

"3. Does a claimant have the right to file his bond with anyone other than the Alabama Alcoholic Beverage Control Board?

"4. What is the effect of Section 35 of the Alabama Beverage Control Act upon Sections 4779 and 4780 of the 1923 Code of Alabama."

As has been previously stated by this office on numerous occasions, there are many ambiguous and conflicting provisions of the Alabama Beverage Control Act which make the same very difficult of interpretation in many respects. The questions propounded in your inquiry fall in this classification.

This office has heretofore held, notwithstanding the provision contained in Section 51 of the said Act that the Act shall not go into effect in a dry county and that all laws prohibiting the manufacture and sale of alcoholic liquors or beverages now in force and effect in Alabama shall remain in full force and effect in every such county, (1) that alcoholic beverages, including liquor, legally purchased in a wet county in Alabama can be legally possessed in a dry county in Alabama (See opinion to Hon. E. Dick Burrows, Sheriff, Walker County, Jasper, Alabama, under date of April 3, 1937) and (2) that the Alabama Alcoholic Beverage Control Board has the same jurisdiction in dry counties that it has in wet counties in regard to the enforcement of the regulatory provisions of the Act. (See opinion to Hon. Wm. O. Baldwin, Chairman, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, under date of July 29, 1937.

It might be well to point out here that the question which was submitted to the vote of the people of the sixty-seven counties of this State on March 10, 1937, was as follows:

"Do you favor the legal sale and distribution of alcoholic beverages within this County?"

It will be noted that the question did not ask whether or not the people favored the placing into effect of the provisions of the Alabama Beverage Control Act in the County.

The above conclusions were arrived at on the basis of the fundamental rule of statutory construction, to which all other rules are subordinate, that the intention of the Legislature, embodied in a statute, is the law, and that the courts will, by all aids available, ascertain and give effect to this intention, whether the same is in accordance with the strict letter of the statute or not, if the wording of the statute is ambiguous and conflicting.

Sections 33 and 34 of the Alabama Beverage Control Act are the sections which set out the commodities which are subject to confiscation under the Alabama Beverage Control Act. These sections read as follows:

"Section 33. Commodities Subject to Confiscation. Any alcoholic beverages enumerated and defined herein, or other products taxable under this Act, found at any point within the State of Alabama, which said alcoholic beverages enumerated and defined herein, or other products taxable under this Act, shall have been within the State of Alabama for a period of two (2) hours, or longer, in possession of any retailer, or for a period of thirty-six (36) hours, or longer, in possession of any wholesaler or distributor not having affixed to the package as above defined the stamps, crowns or lids as above provided, are hereby declared to be contraband goods and the same may be seized by the Board, or its

"agent, and/or by any peace officer of the State of Alabama, without a warrant and the said goods shall be delivered to the Board for sale at public auction to the highest bidder after due advertisement, but the Board before delivering any of said goods so seized, shall require the purchaser to affix the proper amount of stamps, crowns or lids to the individual package as above defined. The proceeds of sale for any goods sold hereunder shall be turned over to the State Treasurer by the Board as other funds collected by said Board. Provided, that the cost of confiscation and sale shall be paid out of the proceeds derived from such sales before making remittance to the State Treasurer. Provided, further, that any of the goods, wares or merchandise herein enumerated, and all such goods, wares and merchandise when offered for sale, either at wholesale or retail without the stamps, crowns or lids having been first affixed, shall be subject to confiscation as hereinabove provided. Provided, further, that any vehicle not a common carrier, which may be used for the transportation for the purpose of sale of unstamped articles as hereinabove enumerated shall likewise be subject to confiscation and sale in the manner as above provided for goods, wares or merchandise without stamps, crowns or lids. Provided, further, should any alcoholic beverages without stamps, crowns or lids as enumerated and defined herein be found in any vehicle which is engaged in the sale, distribution or delivery of taxable alcoholic beverages, the same shall be *prima facie* evidence that it was there for sale." (Emphasis ours)

"Section 34. Other Commodities Subject To Confiscation. Any alcoholic beverages as enumerated and defined in this Act, to be sold and/or distributed by and through State Liquor Stores, found within this State in the possession of or on the premises of any person, firm, corporation or association of persons not having affixed thereto such mark of identification showing that said alcoholic beverages were sold and/or distributed by a State Liquor Store, shall be subject to confiscation and sale in the same manner as set forth in this Act for malt or brewed beverages as defined herein, and vinous beverages not exceeding twenty-four (24 per cent) percent by volume which do not have affixed thereto the required revenue stamps as provided for in this Act, and said persons who are found guilty of having in their possession any such contraband liquors, shall be subject to the same fines and imprisonment as set forth in this Act for persons having in their possession any malt and/or vinous beverages without the proper stamps affixed thereto as required by this Act."

Section 35 provides for the procedure by which commodities subject to confiscation under the provisions of the Alabama Beverage Control Act shall be confiscated. This office, in an opinion to Hon. Haygood Patterson, Sheriff, Montgomery County, Montgomery, Alabama, under date of April 22, 1937, held that liquor subject to forfeiture under the Alabama Beverage Control Act should be confiscated by the sheriff or officer seizing the same under the procedure provided by Section 35, *supra*. This opinion dealt with unstamped and/or unidentified alcoholic beverages that had been seized in a wet county. It is hereby extended to apply to beverages of like kind and character, i. e., unstamped and/or unidentified alcoholic beverages in a dry county as well. It is my opinion that unstamped and/or unidentified alcoholic beverages and also vehicles in which the same are transported must be confiscated in accordance with the provisions of the Alabama Beverage Control Act and the procedure provided in Section 35 thereof, *supra*, in either a wet or dry county in Alabama. It seems very clear from a careful consideration of all the provisions of the Act and

especially the underscored provision of Section 35, *supra*, that this conclusion gives effect to the intention of the Legislature as expressed in said Act.

As to alcoholic beverages which were originally purchased in a legal manner, i. e., from a State Liquor Store or from licensed retail dealers as the case might be, and which bear the proper stamps or identification marks, but which are being illegally sold or kept for sale, it is my opinion that such beverages should be forfeited and destroyed, in either a wet or dry county, in accordance with the provisions of Article 11 of Chapter 167 of the Code of Alabama, 1923, which is the article of the old prohibition statutes providing for the forfeiture and destruction of contraband liquors and other products. As can be seen from a reading of the above quoted sections of the Alabama Beverage Control Act, the confiscation provisions of the said Act do not apply to alcoholic beverages that have been legally purchased and bear the proper stamps and/or identification marks, but which are being illegally sold or kept for sale. These sections only apply to unstamped and/or unidentified alcoholic beverages. Likewise, a vehicle used for the purpose of transporting such beverages for sale in a manner not in accordance with the provisions of the Act is subject to condemnation in accordance with the appropriate provisions of Article 11 of Chapter 167 of the Code of Alabama, *supra*. Therefore, if a person in a wet county who does not hold an appropriate license authorizing him to sell the same is found selling or keeping for sale such alcoholic beverages, then these beverages should be condemned and destroyed in accordance with the provisions of Article 11 of Chapter 167, Code of 1923, *supra*, and not in accordance with the provisions of the Alabama Beverage Control Act, since the confiscation provisions of the Alabama Beverage Control Act are not applicable to the same. The same procedure should be followed in regard to any such legally purchased alcoholic beverages sold or kept for sale in a dry county in Alabama, since the sale of all alcoholic beverages in the dry counties is prohibited. The same procedure should also be followed in regard to the condemnation of any vehicle found transporting such beverages for such purposes.

The conclusions hereinabove reached are in accordance with the conclusions reached by the Supreme Court of the United States in the case of **United States v. One Ford Coupe Auto**, 272 U. S. 321, 71 L. Ed. 279; **Commercial Credit Co. v. United States**, 276 U. S. 226, 72 L. Ed. 541, and **Richbourg Motor Co. v. United States**, 281 U. S. 528, 74 L. Ed. 1016. These cases involved almost the identical question here under consideration. Prior to the passage of the National Prohibition Law, there was in effect Section 3450 of the Revenue Statutes of the United States, which provided for the forfeiture of vehicles used in the removal and concealment of liquors upon which the tax had not been paid. When proceedings were instituted under this section, the vehicles were forfeited without regard to the rights of innocent lien holders. Section 26 of the National Prohibition Law provided for forfeiture of vehicles used in the transportation of prohibited liquors but this section provided for the rights of innocent lien holders. In the three cases above referred to, the Supreme Court of the United States had presented the direct question of the effect of the passage of Section 26 of the National Prohibition Law upon the preexisting statute also providing for confiscation of vehicles. The conclusion reached by the Supreme Court was that if there was a transportation of liquors in violation of the National Prohibition Law, then that statute, being the later statute, applied, but that if there was a transportation of liquor not covered by the National Prohibition Law but upon which Section 3450 of the Revenue Act applied, that then the vehicle in question could be forfeited under that statute.

Recapitulating, briefly, it is my opinion (1) that unstamped and/or unidentified alcoholic beverages, and also vehicles used in the transportation of the same should be confiscated under the appropriate provisions of the Alabama Beverage Control Act in either a wet or dry county, and (2) that stamped and/or identified alcoholic beverages which were originally purchased in accordance with the provisions of the Alabama Beverage Control Act but which are being illegally sold or kept for sale, and vehicles used for the transportation of the same, should be condemned and disposed of in either a wet or dry county, in accordance with the appropriate sections of Article 11 of Chapter 167 of the Code of Alabama, 1923.

Premises considered, your questions must be answered as follows:

1 (a) Section 35 of the Alabama Beverage Control Act covers the procedure for the sale of confiscated automobiles or vehicles used in the transportation of unstamped and/or unidentified alcoholic beverages, that is, alcoholic beverages not sold in accordance with the provisions of the Alabama Beverage Control Act, in either a wet or dry county.

(b) The appropriate sections of Article 11, Chapter 167, Code of Alabama, 1923, govern the procedure for the condemnation and sale of confiscated automobiles or vehicles used to transport stamped and/or identified alcoholic beverages, that is, alcoholic beverages originally purchased in accordance with the provisions of the Alabama Beverage Control Act, which are being illegally sold and kept for sale in either a wet or dry county.

2 (a) The Solicitor of a Circuit Court of a county in which a vehicle is seized must follow the procedure for the confiscation of the same provided by Section 35 of the Alabama Beverage Control Act, if the vehicle so seized was transporting unstamped and/or unidentified alcoholic beverages, that is, alcoholic beverages not sold in accordance with the provisions of the Alabama Beverage Control Act, in either a wet or dry county.

(b) If the automobile seized was used for the transportation of stamped and/or identified alcoholic beverages, that is, alcoholic beverages originally purchased in accordance with the provisions of the Alabama Beverage Control Act, which were being illegally sold or kept for sale, the procedure for confiscation of the same is that set out hereinabove in my answer 2 (b), and none of the provisions of Section 35 of the Alabama Beverage Control Act apply, in either a wet or dry county.

3 (a) If the automobile or vehicle is being used to transport unstamped or unidentified alcoholic beverages, that is, alcoholic beverages not sold in accordance with the provisions of the Alabama Beverage Control Act, then the claimant must file his bond with the Alabama Alcoholic Beverage Control Board, as provided in Section 35 of the Alabama Beverage Control Act.

(b) If the automobile or vehicle is being used to transport stamped and/or identified alcoholic beverages, that is, alcoholic beverages originally purchased in accordance with the provisions of the Alabama Beverage Control Act, which are being illegally sold or kept for sale, then the bond should be made and filed in accordance with the provisions of Section 4780 of Article 11 of Chapter 167 of the Code of Alabama of 1923.

Your fourth question, as to the effect of Section 35 of the Alabama Beverage Control Act upon Sections 4779 and 4780 of the Code of Alabama of 1923, which are sections of Article 11 of Chapter 167 thereof, have been specifically answered hereinabove.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

July 29, 1937.

Hon. J. Sam Cleiland, Sheriff,
Clarke County,
Grove Hill, Alabama.

Alabama Beverage Control Act.

1. (a) Possession of unstamped and/or unidentified alcoholic beverages, including liquor, that is, alcoholic beverages not purchased in accordance with the provisions of the Alabama Beverage Control Act, is illegal anywhere in the State of Alabama, in either a wet or dry county.

(b) Possession of stamped and/or identified alcoholic beverages, that is, alcoholic beverages purchased in accordance with the provisions of the Alabama Beverage Control Act, in a filling station, cafe, or night club, in a dry county, is prima facie evidence that the same are possessed for sale or distribution with the intent to sell or distribute the same contrary to law.

2. Sheriff of a dry county held legally justified in seizing stamped and/or identified alcoholic beverages, that is, alcoholic beverages purchased in accordance with the provisions of the Alabama Beverage Control Act, which are possessed in a filling station, cafe, or night club, and arresting the proprietor of such a place on a charge of selling, offering to sell, or illegally having in possession, alcoholic beverages contrary to law.

3. In such a case, as the one dealt with in sub-section 2, if there is no conviction, the alcoholic beverages so seized should be returned by the sheriff to the person from whom they are seized, and the sheriff would incur no liability on his official bond.

4. In such a case as the one dealt with in sub-section 2, if there is a conviction, the alcoholic beverages so seized should be disposed of in accordance with the appropriate provisions of Article 11 of Chapter 167, of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 29, 1937, which follows:

"In Clarke County, which is a dry County under the Alabama Beverage Control Act, there are a number of filling stations, cafes, and night clubs, none of which is used exclusively as a dwelling house, and at which places of business there is kept, and I have reason to believe sold, although I may not be able to prove the sale, either beer or whiskey, or both.

"(1) Is the possession of beer or whiskey under the above circumstances prima facie evidence of a sale of whiskey or beer in a dry County.

"(2) On the above facts would I be legally justified in seizing such beer or whiskey and arresting the proprietor of such a place of business on the charge of selling, offering for sale or illegally having in possession prohibited liquors and beverages contrary to law.

"(3) If there is no conviction, should I return such beer or whiskey to the owner, and in that event would I be free from liability on my official bond?

"(4) Upon conviction, what disposition should be made of the beer or whiskey so seized?"

All of the questions propounded in your request for opinion have heretofore been dealt with generally by this office. Therefore, we will not again here go into detailed discussion of them, but rather, will answer your questions categorically, making reference to the opinion or opinions of this office containing the answers to the same, copies of which opinions are herewith enclosed for your further information.

- 1. You first ask whether or not the possession of beer or whiskey in a filling station, cafe, or night club, in your county which is a dry county, is prima facie evidence of a sale of beer or whiskey.

(a) The possession of unstamped and/or unidentified alcoholic beverages, that is, alcoholic beverages not purchased in accordance with the provisions of the Alabama Beverage Control Act, is illegal anywhere in the State of Alabama, in either a wet or dry county. See opinion of the Attorney General to Hon. E. Dick Burrows, Sheriff, Walker County, Jasper, Alabama, under date of April 3, 1937, and the provisions of Sections 51 and 61 of the Alcoholic Beverage Control Act cited and quoted in the last part thereof.

However, I presume from your letter of inquiry that the questions you propound therein concern stamped and/or identified alcoholic beverages, that is, alcoholic beverages purchased in accordance with the provisions of the Alabama Beverage Control Act.

(b) The possession of stamped and/or identified alcoholic beverages, that is, alcoholic beverages purchased in accordance with the provisions of the Alabama Beverage Control Act, in a filling station, cafe or night club, in your county, which is a dry county, is prima facie evidence that the same are possessed for sale or distribution, with the intent to sell or distribute same contrary to law. See opinion of the Attorney General to Hon. Festus M. Shamblin, Sheriff, Tuscaloosa County, Tuscaloosa, Alabama, under date of May 29, 1937, holding that the keeping of illegally purchased alcoholic beverages of any kind in cafe or eating establishment in a dry county shall be prima facie evidence that same are kept for sale or distribution with intent to sell or distribute contrary to law. Following the reasoning contained in that opinion, that holding is hereby extended to likewise apply to such beverages possessed in a filling station or a night club in a dry county.

2-3 Your second question is whether or not you would be legally justified in seizing such alcoholic beverages, so possessed, and arresting the proprietor of such a place of business on the charge of selling, offering for sale, or illegally having in possession, alcoholic beverages contrary to law. Your third question is whether or not you should, in such a case, in the event there is no conviction, return the alcoholic beverages so seized by you to the owner and whether or not you would be without liability on your official bond. These two questions will be here answered together. I quote from the opinion to Mr. Shamblin, supra.

"I am further of the opinion that the sheriff has authority to seize such alcoholic beverages in a dry county, under the above circumstances, and that he would not be liable to the owner of such alcoholic beverages so seized. Of course, the question of whether or not such alcoholic beverages in a dry county were possessed for the purpose of sale or distribution contrary to law is a question of fact for the court or jury, to be determined by all of the attendant circumstances.

"If upon a trial of the issues the court or jury, as the case may be, should decide in favor of the defendant, such finding amounting to a legal determination by them that said alcoholic beverages were not possessed for sale or distribution contrary to law, then the possession of same would be legal and the beverages should be returned by the officers to the person or persons from whom seized."

Therefore, you will be legally justified in seizing such alcoholic beverages so possessed and in arresting the proprietor of such a place of business on the charge of selling, offering for sale, or illegally having in possession alcoholic beverages contrary to law. If there is no conviction, you should return the alcoholic beverages so seized to the person from whom they were seized and you would be free from liability on your official bond.

Your fourth question is how you should proceed, in such a case, if there is a conviction, to dispose of the alcoholic beverages seized by you.

In such a case, if the person from whom the beverages are seized is convicted, this conviction amounts to a legal determination that the alcoholic beverages found in his possession and seized from him, though legally purchased, were being illegally possessed for sale or distribution or illegally sold. After such a legal determination, you should proceed to condemn and destroy such alcoholic beverages in accordance with the provisions of the appropriate sections of Article 11 of Chapter 167 of the Code of Alabama, 1923. See opinion of the Attorney General to Hon. D. E. Dunn, Asst. Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, under date of July 29, 1937. I might add that this opinion also sets out the procedure to be followed in the confiscation of unstamped and/or unidentified alcoholic beverages, that is, alcoholic beverages not purchased in accordance with the provisions of the Alabama Beverage Control Act, as well as the procedure to be followed for the confiscation of stamped and/or identified alcoholic beverages, that is, alcoholic beverages purchased in accordance with the provisions of the Alabama Beverage Control Act, which are illegally possessed for sale or distribution or illegally sold.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 29, 1937.

Hon. John D. McNeal, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

1. The term "billboard", as used in said Act does not mean a structure of any particular size but merely a structure with a flat surface, annexed to the land, which has been erected for the purpose of placing thereon advertising matter.

2. The advertising matter placed on such a structure may be placed thereon by posting, pasting or painting; and the advertising matter so placed thereon may consist of bills, posters, glass, electrical, or Neon material or material of like kind and character, or a combination of one or more of such materials.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

On May 5, 1937, I received a letter from you which read as follows:

"Section 10 of the Alabama Beverage Control Act contains the following provisions with reference to advertising alcoholic beverages, to-wit: 'There shall be no advertising of alcoholic beverages as enumerated and defined herein, except through newspapers, magazines, and radio broadcasting stations, provided, however, that malt or vinous beverages as herein provided may be advertised by means of billboards.'

"Section 28 of said Act contains the further provision with reference to advertising of alcoholic beverages, as follows: 'There shall be no electrical signs, painted signs, etc., displayed outside any place of business advertising alcoholic beverages as enumerated and defined.'

"The Alabama Alcoholic Beverage Control Board has received inquiries seeking determination of the nature of advertising permitted. It appears that there is no restriction on advertising through the medium of newspapers, magazines and radio broadcasting stations. It further appears that there is no restriction on the advertising of malt or vinous beverages by means of 'billboards'. In this connection it is necessary to determine what is meant by the word 'billboard' and would like an opinion on the following questions:

"1. Is it intended to designate a structure of a certain size or used in a certain manner?

"2. Does it mean a board whereon there is affixed what is commonly known as a bill or poster, and also, painted or electric signs?

"In promulgating rules and regulations governing this subject of advertising, we would like to be advised as to what is meant by the word 'billboard'".

I rendered an opinion in answer thereto under date of May 29, 1937. On July 13, 1937, I received from Hon. D. E. Dunn, your Assistant Administrator, the following letter:

"The Alabama Alcoholic Beverage Control Board has received numerous inquiries from various advertising agencies with reference to the opinion rendered by you on May 29, 1937, on 'What Constitutes a Billboard?'

"In order to answer these questions, we would like to have your opinion on the following:

"1. Would the structure on which there is posted thereon glass or other material of similar nature which reflects light at night, advertising various brands of beer under which is posted the name of various distributors, conform to the provisions of the Alabama Beverage Control Act, governing the advertising of malt and brewed beverages?

"2. Would the structure on which there is affixed buttons of glass protruding an inch or more from the surface of such a structure over which there is pasted or posted advertising matter advertising malt and brewed beverages, said buttons of glass being used to re-

flect the light of automobiles at night, conform to the provisions of the Alabama Beverage Control Act regarding advertising of this kind?"

Upon a further consideration of the opinion rendered you on May 29, 1937, and the questions therein answered, I am of the opinion that that opinion is laid in error. Therefore, it is hereby expressly overruled and withdrawn and this opinion is substituted in its stead.

As stated in your letter of May 5, the last sentence of Section 10 of the Alabama Beverage Control Act provides as follows:

"There shall be no advertising of alcoholic beverages as enumerated and defined herein, except through newspapers, magazines, and radio broadcasting stations, provided, however, that malt or vinous beverages as herein defined may be advertised by means of billboards."

In reply to your first question, it is my opinion that the word "billboard", as used in the above quoted provision of the Alabama Beverage Control Act, is not intended to designate a structure of any particular size, but merely a structure with a flat surface, annexed to the land, which has been erected for the purpose of placing thereon advertising matter. That such a structure must be annexed to the land is in accordance with a holding of the Court of Appeals of Alabama as announced in the case of **Cochrane v. McDermott Advertising Agency**, 6 Ala. App. 131, 60 So. 42; and by the Supreme Court of Georgia in the case of **Randall v. Atlanta Advertising Service**, 125 S. E. 142, each of which cases holds that a "billboard" refers to an erection annexed to the land, in the nature of a fence, for the posting of advertising bills and posters. Nowhere have I been able to find a decision holding that a "billboard" must be a structure of any particular size, and it is my opinion that the word "billboard", as used in the Alabama Beverage Control Act, was not intended to designate a structure of any particular size.

In answer to your second question, it is my opinion that the word "billboard", as used in the Alabama Beverage Control Act, includes such a structure as the one referred to in my answer to your first question, on which there is placed advertising matter by posting, pasting or painting and that the advertising matter so placed thereon by posting, pasting or painting may consist of bills, posters, glass, electrical, or Neon material, or material of like kind and character, or a combination of one or more of such materials.

A "billboard" is generally regarded as a large structure or board placed usually upon public streets or highways for advertising purposes. The advertising material placed on these structures or boards are placed on them in any of a number of ways: Skilled painters or artists may paint pictures on them; skilled workmen may employ electric or Neon lighting to create signs or pictures easily seen or read at night; or bills or posters may be pasted or posted upon them.

It is true that the two cases referred to hereinabove, which are the only two cases that can be found in which any court has attempted to define the word "billboard", both state that "billboards" are structures annexed to the land, in the nature of a fence, for the purpose of posting advertising bills and posters. However, in my opinion, these cases cannot be regarded as controlling or even as persuasive authority on the question of whether or not the word "billboard" includes a structure or board on which advertising material is placed thereon in some manner other than posting, for in

neither of these cases was this question before the court. In *Cochrane v. McDermott Advertising Agency*, supra, the pleadings alleged that a "billboard" was erected on certain property and the question raised was whether such "billboard" became part of the realty. There was no question before the court as to a distinction between a structure or board on which bills or posters were posted and a structure or board on which advertising matter was placed in some other manner. The court merely casually, in the course of its opinion, gave a definition of "billboards", and only with reference to the question of whether or not a "billboard" became a part of the realty upon an annexation to the land, can this definition be considered as controlling or persuasive. Insofar as our present problem is concerned, anything said in that opinion in regard to the manner in which advertising matter is placed on such a structure is, of course, dicta. In the case of *Randall v. Atlanta Advertising Service*, supra, the question before the court was whether a "billboard" was a "building" within the meaning of a restriction against certain types of buildings, and here, too, there was no question of distinction between a board on which bills or posters were posted and a board or structure on which advertising matter was placed in some other manner. Anything said in that opinion in this regard is likewise dicta so far as our problem is concerned.

It is my opinion that it was never the intention of the legislature to draw a fine and narrow distinction between outdoor advertising boards on which the advertising matter appearing thereon consisted of bills and posters posted thereon and outdoor advertising boards on which the advertising matter placed thereon was made of some other material or placed thereon in some other manner. It is a cardinal rule of statutory construction that the intention of the legislature is to be sought in construing a statute. In seeking the intention, courts are not confined to the literal meaning of the words used therein, when it appears from the act that it was not the intention of the Legislature that the words be so construed, and the courts may extend the meaning beyond the precise words used, especially if in so doing they might avoid an absurd or unjust construction. These general rules are so well established that it is not here necessary to lengthen this opinion by citing or quoting from decisions to support the same.

In my opinion, it was the intention of the Legislature that a "billboard", as used in the above quoted provision of the act, meant an outdoor advertising structure on which advertising material of any kind or character, was placed in any convenient manner or by any desirable method. Therefore, it is my opinion that the word "billboard", as used therein, was not intended to mean a structure on which only advertising bills or posters could be posted, but that it was intended to mean a structure on which advertising matter might be placed by posting, pasting or painting and that the advertising matter so placed thereon might consist of bills, posters, glass, electrical or Neon equipment or like material, or a combination of one or more of these. In my opinion, such a holding gives effect to the legislative intention, which, when ascertained, is the law itself. A contrary holding, such as the holding announced in the opinion heretofore rendered to you, which I now overrule and withdraw, would lead to an unjust conclusion.

This holding does not conflict with the provisions of the Act contained in Section 28 thereof, which is referred to in your letter of May 5, to the effect that "there shall be no electric signs, painted signs, etc., displayed outside any place of business advertising alcoholic beverages as enumerated and defined." This provision, in my opinion, was intended to prohibit such a sign being placed immediately outside of a place of business where alcoholic beverages were sold, for the purpose of advertising the

fact that such beverages were sold therein, and was not intended to apply to or place any restriction on such advertising by means of "billboards", which, as I have hereinabove stated, are generally regarded as large structures or boards placed usually along public streets or highways for advertising purposes.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

August 10, 1937.

Hon. J. E. McAdory,
Deputy Tax Assessor,
Jefferson County, Bessemer Division,
Bessemer, Alabama.

Taxation—Homestead exemptions—Act No. 107, p. 113 Special Session, 1936-1937.

Property, used as a homestead before and since sale to the State in 1934 for taxes, which was redeemed from State after October 1, 1936, on annual installment payment plan, is exempt from lien for State taxes.

Opinion by Assistant Attorney General Simmons:

Dear Sir:

Reference is made to your inquiry as follows:

"To be more explicit in my request; a man owns a piece of property which he bought in 1932. In 1933 he did not pay his taxes and in 1934 sold to the State for its taxes for year of 1933. In November, 1936, this man redeems his property and comes in and claims Homestead Exemption, which he has lived in and had possession of since 1932. Is he entitled to Homestead Exemption?"

You orally supplemented the foregoing facts by stating that the property was redeemed pursuant to the annual installment payment plan set forth in Section 291, Act No. 194, General Acts of Alabama, 1935, p. 256.

It is my opinion that the property is exempt from State taxes within the limits of and pursuant to the terms of Act No. 107, Special Session, 1936-1937, which provides exemptions of homesteads in Alabama from State taxes.

When the first installment was paid, redemption was perfected, and title passed out of the State into the redemptioner, subject to the lien of the State for unpaid installments and current as well as future taxes.—Section 292, Revenue Act of Alabama (Act No. 194), General Acts, 1935, p. 256. See opinion of this office to Hon. W. E. Butler, Judge of Probate, Madison County, Huntsville, Alabama, under date of June 26, 1937. Also see opinion of this office to Hon. Roy Johnson, Vol. 2, p. 207, from which the following is quoted:

"Without more, the foregoing would very clearly indicate that so far as passing the title from the State to the redemptioner, the same

legal effect is intended by the installment payment as if the redemption money had been paid in full."

The redemptioner is required, within thirty days from the date of making the initial installment payment, to assess the property for taxes for the then current tax year.—Section 291, General Revenue Act, supra.

When the redemptioner paid the initial installment, the State immediately acquired a lien for taxes for the then current tax year, and that is true whether the lien for taxes which attached as of October 1st against all other property, or a different lien created under Section 292, General Revenue Act, supra, attached. A lien attached for current taxes, and as against the same for State taxes, the property is exempt.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 10, 1937.

Hon. Solomon Baxter, Superintendent,
Houston County Board of Education,
Dothan, Alabama.

County Board of Education may consolidate entire county outside of district of incorporated city into one school tax district.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 16, 1937, in which you request my opinion as follows:

"I am writing you with reference to the Houston County Board of Education local tax units.

"Houston County is divided into thirteen different tax districts including the City of Dothan. The Board wishes to enlarge its districts. The consolidation of schools no longer makes it necessary to maintain small tax districts. Will the Board be within its rights to include the whole county outside of the district of Dothan in one tax district? or will the County Board of Education need to fix two school districts in Houston County outside the City of Dothan? If you have ruled on this point please refer me to such; if not, please give this your attention as early as convenient."

In answer to your inquiry I refer you to the opinion of this office in Biennial Report 1924-1926, p. 311. I quote from that opinion:

"Therefore, we arrive at the conclusion that the method of consolidation provided in Sections 235 and 236 of the School Code apply only when a part of the territory sought to be consolidated is levying the special tax; that when none of the territory sought to be consolidated is levying such tax, then the county board of education can district such territory over which they may have jurisdiction or which may not have been by law districted.

"However, this discretion must be exercised with due regard for the needs of the county and cannot be exercised **arbitrarily**.

"To the County Board of Education is committed the power of determining the boundaries of school districts lying without the incorporate limits of cities of two thousand or more population. In the exercise of the discretion of the county board of education in fixing the boundaries of such district, the courts will not interfere unless it appears that the fixing of the boundaries of such district was arbitrary and violative of all things conducive of serving the best educational interest of the people of the district. With the advent of good roads and improved transportation facilities it is reasonable to suppose that the area that should be included in a school district so as to serve best the educational interests of such territory will constantly become larger. Determining of such is committed to the county board of education and its action is final so long as that action is determined by the consideration of the best educational interests of the territory to be served.'

"Therefore, in the instant case, I am unable to advise you whether or not such a districting of your county would be an arbitrary exercise of this discretion. If such should be shown to have been arbitrarily done and not for the best interests of the county or the people, the courts would interfere.

"Hoping that the foregoing discussion will clarify the question, I am."

Sections 235 and 236 of the School Code of 1924 referred to in that opinion have been brought forward into the School Code of 1927 as Sections 275 and 277 without change.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

August 10, 1937.

Hon. Henry S. Long,
Chairman, State Tax Commission,
C A P I T O L .

Chain Store License—

Person or group of persons operating two places of business, side by side, the first floors of which are separated by a solid wall, it being impossible to go in from the first floor of one business to the first floor of the other without going out on the street or going up to the second floor and going through a small door or archway which connects the second floor of these places of business which second floors are used mainly as stock or storage rooms, where the goods of both places of business are intermingled, and which door or archway on the second floor is merely for convenience, the two places of business having different names, each place of business having a separate cash register and keeping separate books, the buying for the two places being done by the same person or group of persons, and the ultimate profits from each place of business going to the same person or group of persons, held to be operating chain of two separate stores, which should be re-

quired to pay the appropriate chain store license levied by Act 369, General Acts of 1931, page 431, approved July 7, 1931, for the years 1934-35 and by Schedule 155.4 of the 1935 Revenue Act for the year 1936.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 12, 1936, which follows:

"Attached hereto you will find files of the Pizitz Mercantile Company and the Palais Royal Store. Please give me an opinion as to whether or not this is one store or a chain of two stores, as set up by the present 'Chain Store Law'."

I have carefully examined the file which you have handed to me in connection with the matter and from which I gather the following:

In Tuscaloosa, Ala., one person or group of persons owns and operates two places of business known as the Palais Royal Dress Shop and the Pizitz Mercantile Company. These two places of business are side by side. The first floor of these places of business is separated by a solid wall. You cannot go from the first floor of one place of business to the first floor of the other place of business without going out onto the street or going up to the second floor and going through a small door or archway which connects the second floors of these places of business. The second floor of each place of business is used mainly as a stock or storage room. Goods and merchandise of the two places of business are intermingled in these stock or store rooms which are on the second floor. As a matter of convenience a door or archway has been cut through the partition or wall which separates the second floor of these places of business so that goods can be carried through from one place of business to the other without the necessity of going from one out onto the street before you can get to the other. The buying for the two places of business is done by the same person or group of persons. Each place of business has a separate cash register and keeps separate books. The ultimate profits from each place of business go to the same person or group of persons.

You ask my opinion as to whether or not these two places of business constitute one store or whether or not they constitute two stores, each of which is due the appropriate license.

It is my opinion that these two places of business constitute two separate stores which are part of the same chain and, as such, each of them is due the appropriate license levied by Act No. 369, General Acts, 1931, page 431, approved July 7, 1931, for the years 1934 and 1935, and by Schedule 155.4 of the 1935 Revenue Act for the year 1936.

Schedule 155.7 of the 1935 Revenue Act defines the term "store". It reads as follows:

"The term 'store' as used in this Schedule shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained, controlled or for which the buying is done by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold, either at retail or wholesale. The term 'store' as used in this schedule shall not be construed to mean or include any place of business at which the principal business conduct-

"ed is that of selling or distributing petroleum products; 'and ice where the amount kept in any store is less than 4000 pounds at any one time'. Provided, however, that if this exception should be held unconstitutional, such holding shall not affect the remaining portions of this Schedule, the Legislature hereby declaring that it would enact the provisions of this schedule irrespective of the foregoing exceptions, and if such exceptions be invalid, such places shall be subject to the provisions of this schedule. Two or more stores or mercantile establishments shall, for the purpose of this Schedule, be treated as being under a single or common ownership, supervision or management if directly or indirectly owned or controlled by a single person or any group of persons having a common interest in such stores or mercantile establishments, or if any part of the gross revenues, net revenues, or profits from any such stores or mercantile establishments shall directly or indirectly be required to be immediately or ultimately made available for the beneficial uses, or shall directly or indirectly inure to the immediate or ultimate benefit, of any single person or any group of persons having a common interest therein."

It was similarly defined by Section 8 of the 1931 Act, supra.

Certainly it cannot be doubted that these two places of business, if they are two separate stores, are stores which belong to a chain. There seems to be no question raised by the file which you furnished me for my information as to this point.

The owner or owners of these places of business seem to think that because the second floors are connected by a door or archway that this fact makes them one store and not two separate stores. I cannot agree with this view. From the facts which I gather from your file the main business in each place is done on the first floor. As stated above, in my summary of the facts which I gathered from the file, the first floor of each place of business is separated by a solid wall or partition. There is no connection whatever between them. The second floor of these places of business is used mainly as a stock or store room and has an archway in the partition between it chiefly for convenience. In my opinion, this fact does not make them one store. Each place of business has a separate and distinct name. Each place of business keeps separate books and, as shown above, the parts of each place of business where the principal business of operating or selling merchandise is carried on are entirely separate. In my mind, these two places of business are certainly two separate stores and the fact that they are owned and operated by the same person or group of persons and the buying is done by the same person or group of persons and that the ultimate profits from each place of business go to the same person or group of persons constitutes them a chain and makes each place of business liable for the appropriate license levied by Schedule 155.4 for each store which is part of the chain.

The file shows that each of these places of business has paid the appropriate license for a store as part of a chain for the years 1934-1935 and 1936, and that the owner or owners are now making application for refund for over-payment of license, for each of three years claiming that they operate only one store and should be required to pay license on only one. I have held above that these two places of business which these parties own and operate constitute two separate stores which are part of the same chain and that they must pay the appropriate license on each store. However, the file shows that the 1935 license was paid on February 13, 1935, and, though it is not shown by the file, I presume that the 1934 license was paid during the year 1934 and prior to the date on which the 1935 license was paid.

I call your attention to the fact that, even though it should be found that these parties were entitled to a refund for over-payment of license for each of the years which they claim, viz: 1934, 1935 and 1936, that they would be now barred by the statute of limitations from receiving the same. The right of a taxpayer to secure a refund of taxes which have been erroneously paid or have been over-paid is purely statutory. The statute which provides for the refund in such a case as this, if the facts justify, is Act No. 432, General Acts 1931, at page 527, approved July 17, 1931. This act provides how application for a refund shall be made and provides further that such application must be made within twelve months from the date of payment. Since application for a refund was made in this case more than twelve months after the date of payment of the license for 1934 and 1935, these parties would now be barred from securing a refund as to the license allegedly over-paid for the years 1934 and 1935 by the statute of limitations contained in the 1931 Act, supra, even though it should be found from the facts that they were entitled to the same. However, as stated above the facts do not entitle the parties to a refund in any event, regardless of the statute of limitations.

Yours very truly,

A. A. CARMICHAEL,

Attorney General,

August 10, 1937.

Honorable Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation—Homestead—Abandonment.

Abandonment of homestead, by having removed therefrom more than four years, leaving gratuitous occupant in possession of property, is a question of fact to be determined from intention of owners.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of recent date which I quote as follows:

"A taxpayer in this county has owned a house for fifteen years, which he occupied as his home until about four years ago. At that time he and his wife moved to another house for which they pay rent, and his mother moved into the house that he owned. This situation still prevails and the owner has continued to pay the taxes, insurance, all public utility bills and the expenses for the up-keep of the house.

"Will you please render an official opinion as to whether or not this man is entitled to claim homestead exemption from State ad valorem taxes?"

The question you present is one of intention on the part of the taxpayer. I assume that the mother pays no rent, but is a gratuitous occupant. Homestead exemptions from the payment of state ad valorem tax are governed by the Constitution and laws of the State of Alabama. Act No. 107, Special

Session, 1936-37. If the taxpayer merely abandoned the home temporarily, and intended then and continuously thereafter to return, he would be entitled to homestead exemption, but on the other hand, if at the time of leaving such homestead, he had no intention to return, the homestead was forfeited. I quote from the case of **Fuller v. American Supply Co.** 185 Ala. 512, with specific reference to that portion of the opinion beginning with the first paragraph on p. 520, as follows:

"Statutes on the subject of homestead and other exemptions have always received a liberal construction in furtherance of the humane constitutional and legislative purpose. Considering this section of the Code in view of the policy elsewhere uniformly followed by the Legislature and the courts, and in connection with the antecedent law, we are satisfied that it was not the intention of the statute, in the form to which it has been reduced by the revisers of the Code, to make the filing of a declaration with the probate judge an indispensable condition upon which the owner of a homestead may have the protection of his exemption during temporary absences in which he intends to return, and continuously keeps it within his power to do so. To so construe the statute would be to add to the burdens of 'actual occupants,' while conferring the benefit of the exemption upon lessors whom the statute brought under the protection of the Constitution with some degree of doubtful propriety, for the right of homestead is 'conferred to protect the roof that shelters and cannot be converted into a shield of investments in lands, from which rents and profits are to be derived.'— **Boyle v. Shulman**, supra. In a number of states it was held that a leasing did not work a forfeiture.—**Thomp. Homesteads**, Sec. 273. In this state, however, judicial decision had made it necessary that the rule of those states should be adopted by statute, if at all; and, of course, conditions might be attached. But in the case of temporary absence without more, the statute did nothing for the benefit of the homestead owner, unless, as was suggested in **Beckert v. Whitlock**, supra, the filing of a declaration furnished prima facie evidence of the owner's intention to return and occupy. On the other hand, the letter of the statute does not deny to the owner, quitting temporarily, any privilege he had previously enjoyed. There are in the Code scores of instances in which the Legislature has expressed a right which already existed. Aside from the suggestion of **Beckert v. Whitlock**, this act merely states a case in which the owner who quits temporarily, without leasing, shall not lose his exemption. As to him, the letter of the statute declares and reaffirms a right he already had. To his essential rights and privileges it added nothing, though it may have aided him in the proof of them. No other conclusion would accord with the policy heretofore uniformly pursued by the Legislature and this court. Any other interpretation would make the statute in its present shape a pitfall and a nuisance to owners who may find occasion to quit their homes for brief periods without letting them to rent. We fully recognize the rule that the office of construction is to ascertain what the language of an act means, and not what the Legislature may have intended apart from the language used. But such construction ought to be put upon the statute as will best answer the intention the makers had in view, which was, as we think has appeared from several concurring considerations, to afford further protection to homestead exemptioners. 'In some cases,' to meet the evident purpose of the lawmakers, 'the letter of a Legislative act is restrained by an equitable construction; in others it is enlarged, as where the case comes within the identical reason upon which the lawmaker proceeded, not merely a like reason (**U. S. v. Freeman**, 3 How. 556, 11 Ed. 724); in

"'others the construction is contrary to the letter.' (Beley v. Naphtaly, 169 U. S. 360, 18 Sup. Ct. 354, L. Ed. 775). The opinion we reach, involves no impossible or strained construction of the statute. On the contrary, we think settled canons of interpretation, some of them having special application to exemption laws, lead to the conclusion that the language employed in the original statute, and in its revision, intends that the owner who quits his homestead temporarily, without letting it to rent, does not forfeit his exemption though he fails to file a declaration of claim.

"The question of intention in cases of this character is generally a question for jury decision in which the element of the lapse of time during which the owner has remained away from his homestead plays a considerable part, though it is not conclusive unless prolonged beyond all reason. On the evidence in this case it was a question of inferential fact whether appellant in quitting his homestead intended then and continuously thereafter to return, or whether, having no such intention, he at any time prior to the levy of execution abandoned, *facto et animo*, and so forfeited, his right of homestead in the property in suit. This question, on the case as it now appears, should have been submitted to the jury, and the general charge for appellee was error."

You will, therefore, ascertain from the claimant all the pertinent facts necessary for your determination as to whether or not the taxpayer left the property with no intention to return thereby forfeiting his homestead right, or whether at the time of such departure and continuously thereafter the taxpayer entertained an intent to return and enjoy the premises as a homestead.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

August 10, 1937.

Hon. William O. Baldwin, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama

Alabama Beverage Control Act—

A person operating a specialty delivery service who, with his money, purchases from a State liquor store, as agent for another, alcoholic beverages desired by such other person, and delivers the same to such other person at his home or place of business, collecting from him the cost of the alcoholic beverages so purchased and delivered, plus a small delivery fee, is engaged in illegally selling or distributing alcoholic beverages, whether such deliveries be in wet counties or in dry counties of the State of Alabama.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of July 13, 1937, which (with names and addresses omitted) follows:

"On 28 June 1937, the Alabama Alcoholic Beverage Control Board received from Mr. _____, Box _____, _____, Alabama, a letter quoted hereunder:

" 'I operate a Specialty Delivery Service in Morgan and Limestone Counties and I have had several people a day asking me to deliver to them a quantity of whiskey from the State Store in Huntsville. They authorizing me as their agent, would I meet the requirements of the law, taking their order and delivering to them the required amount wanted, say—one pint, two qts., or one case.

" 'Please advise me by return mail as to my position in these dry counties.' "

"On 29 June 1937, we replied to Mr. _____'s letter as follows:

" 'We are today in receipt of your letter of 28 June 1937, concerning the operation of a Specialty Delivery Service. We are of the opinion that the purchase and delivery of whiskey in the manner specified in your letter would not be in accordance with the Alabama Beverage Control Act.'

"Yesterday, the Alabama Alcoholic Beverage Control Board received from a citizen of _____ a letter, from which we quote:

" 'I am inclosing a card that came into my possession today, and that is being circulated here. The business of this man seems a very clear violation both of the letter and the spirit of the new state store law. Of course, what he is doing is building up a semi-bootlegging business. I am calling it to your attention for whatever action you see fit.'

"The card to which reference is made bore the language set forth hereunder:

" 'Whiskey!

_____, _____ Co.
_____, Manager

" 'As your agent, we will purchase for and deliver to you at your home or place of business, any whiskey, wine, brandy, gin or other orders you wish filled by the Alabama State Stores of the Alcoholic Beverage Control Board. Only a small delivery fee will be charged, plus the cost of your favorite brand.

" 'Full information Call _____
"Deliveries Made Any Place Within 3 Miles
of _____, "

"It would appear to the members of the Alabama Alcoholic Beverage Control Board that the delivery service as established by Mr. _____ would be a tremendous aid toward bootlegging, and we feel that it is not within the spirit of the Alabama Beverage Control Act that such business be permitted.

"Question 1: May a delivery company solicit or obtain orders for alcoholic beverages to be purchased from a state store and delivered to any given address, and be reimbursed for the cost of the alcoholic beverage plus a delivery charge in 'dry' counties?"

"Question 2: May a delivery company solicit or obtain orders for alcoholic beverages to be purchased from a State store and delivered to any given address, and be reimbursed for the cost of the alcoholic beverages plus a delivery charge in 'wet' counties?"

The answers to the questions propounded in your letter of inquiry hinge upon the sole question of whether or not a person engaged in handling alcoholic beverages in the manner outlined in your letter of inquiry is engaged in the selling or distributing of the same. If he is so engaged in the selling or distributing of the same, then he is illegally selling or distributing the same, whether the deliveries made by him are in a wet county or in a dry county in the State. That alcoholic beverages cannot be sold or distributed in a dry county in the State is very clear from the provisions of the Alabama Beverage Control Act, which are cited in the opinion to Hon. E. Dick Burrows, Sheriff, Walker County, Jasper, Alabama, under date of April 3, 1937, a copy of which opinion has previously been furnished to you. There is no doubt that alcoholic beverages cannot be sold or distributed in a wet county in the State unless the same are sold or distributed in accordance with the provisions of the Alabama Beverage Control Act. Alcoholic beverages such as those mentioned in your letter of inquiry may be sold or distributed in a wet county only by the State Liquor stores and by licensed hotels, clubs and restaurants that qualify under the Act to sell the same and have made application for and secured the necessary license to do so. Of course, the person mentioned in your letter of inquiry is not operating a hotel, club or restaurant and could not secure a license authorizing him to sell alcoholic beverages.

In the opinion of the Court of Appeals in the case of **Cecil B. Grimes v. State**, Sixth Division 145, (Court of Appeals ms.), which was a case involving the so-called "Bank Night" at theatres, Judge Rice, writing the opinion of the court, after stating the facts of the case in which he carefully outlined the plans followed, said: "All said 'plans', as appears, having in view the 'getting outside the ban' of lottery laws not dissimilar to our own". Likewise, it seems apparent to us that the purpose of the person mentioned in your letter of inquiry is to devise a scheme whereby he may sell or distribute alcoholic beverages and at the same time be "outside the ban" of the laws of this State prohibiting the sale or distribution of the same other than in the manner provided in the Alabama Beverage Control Act. His is a novel scheme, but we are persuaded, just as was the Court of Appeals in the Grimes case, *supra*, that the "Bank Night" scheme fell "under the ban of our laws"; that this scheme likewise falls "under the ban of our laws" prohibiting the sale or distribution of alcoholic beverages in any manner other than that provided by the Alabama Beverage Control Act.

Judge Sanford, of the Court of Appeals, aptly said in the case of **Johnston v. State**, 16 Ala. App. 425: "The law abhors dodgers, and will not tolerate subterfuges." The scheme outlined in your letter of inquiry is obviously a subterfuge and an attempt to dodge the laws of this State governing the sale or distribution of alcoholic beverages. It will not be tolerated.

Briefly analyzing the same, it amounts to nothing more nor less than a person going to a State liquor store and there, using his own money, purchasing a particular brand and amount of alcoholic beverages and then taking the same and reselling and distributing it to another person, collecting from him as the price of the sale, the amount paid for the alcoholic beverages to the State liquor store, plus a small additional charge. We do not think it makes any difference, as a matter of law, that the person to whom the beverages are sold informed, in advance, the person selling and

distributing the same to him the quantity and amount of such beverages which he desired, or that he purports to constitute that person his agent for the purpose of buying the same from the State Liquor store and delivering it to him.

We are persuaded that the plan or scheme amounts to nothing more nor less than a sale or distribution of alcoholic beverages contrary to the laws of this State governing the sale and distribution of the same. That it makes no difference whether the delivery is made in a wet or dry county has been pointed out hereinabove.

We have confined our opinion to the particular facts set out by you in your letter of inquiry, but, adopting again the language of Judge Rice in the Grimes case, *supra*, "We do not want to be understood as intimating that it (here, any slight deviation from the plan or scheme set out in your letter of inquiry) would ~~then~~ be beyond the reach of the law".

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 10, 1937

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Taxation—Homestead Exemptions—

Act No. 107, General Acts, 1936-37, page 113—Contracts of Sale and Lease Contracts.

1. Real property, occupied by a person as a homestead pursuant to contract of sale, by the terms of which vendor sold and vendee bought property, vendee agreeing to pay taxes, vendor agreeing to deliver deed upon payment of stipulated sum, is, within lawful area and assessed value, exempt from State taxes before deed is delivered.

2. **Interest** in real property occupied by person as a homestead pursuant to lease contract, by the terms of which lessee agrees to pay taxes and lessor agrees, at option of lessee, to convey title upon payment of agreed consideration, may be lawfully exempt from payment of State taxes before option to purchase is exercised. Interest of owner cannot be claimed as exempt.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date as follows:

"Enclosed is form No. 120, used by the Federal Land Bank of New Orleans for the sale of lands in Alabama. Please advise if real property, within lawful area and value, sold to a purchaser under this form, and occupied by him as a homestead, prior to October 1, 1936, such occupancy now continuing, may be exempted from State taxes for this tax year and subsequent years, pursuant to Act No. 107, Acts of 1936-37, page 113, ex-

"emptying homesteads, even though such property is assessed in the name of the vendor.

"Enclosed is form No. 519, used by the Federal Land Bank of New Orleans, for leasing real estate which it owns, and in giving the lessee an option to buy. Please advise if real property, within lawful area and value, leased to a person under this form, with option to buy, and occupied by the lessee as a homestead, prior to October 1, 1936, such occupancy continuing at the present time, may be exempted from State taxes for this year and subsequent years, pursuant to the act mentioned in the preceding paragraph, even though such property is assessed in the name of the lessor."

Blank form No. 120 enclosed in your letter, when accepted, evidences an agreement that the Federal Land Bank of New Orleans has sold certain real property to the purchaser at and for a stipulated consideration, part of which is paid in cash and the balance the purchaser agrees to pay in deferred installments. The bank further agrees that "when the purchase price has been paid down to \$ _____, and all interest due has been paid, and all other agreements contained herein have been faithfully performed, the bank will execute to me (the purchaser) a deed to the land described herein retaining a vendor's lien for that part of the purchase price which remains unpaid, and at that time and simultaneously therewith to evidence and secure the purchase price still unpaid, I will execute _____ promissory note to said bank payable in _____ installments and maturing one on the _____ day of _____, 19 _____, and one of the same day and month each year thereafter, totalling the amount required to complete said purchase price, and a first mortgage or deed of trust to secure said notes and conveying the lands described herein."

Section 7 of the contract form contains an agreement on the part of the purchaser to obtain and pay for fire and tornado insurance on the buildings located on the property. There are other agreements contained in the instrument, but a synopsis thereof is not pertinent to this opinion.

Blank form No. 519, which you enclose evidences an agreement on the part of the Federal Land Bank that it has leased to the lessee certain real property for a period of years at and for a stipulated rent, and which lessee agrees to pay, along with taxes and insurance premiums. There is no statement in the contract that the bank has sold the property to lessee, nor is there any agreement on the part of the lessee that he will buy the property, but there is an option granted by the lessor to the lessee for the purchase of the property without any obligation on the part of the lessee to buy. This form, 519, is referred to as "Cash Rental Contract with Option to Purchase." It is separate and distinct from Form 120, which is referred to as "Real Estate Purchase Contract."

It is my opinion that property, conforming to lawful area and assessed value as required by Act 107, hereinafter referred to, purchased by agreement contained in Form 120 enclosed in your letter and occupied as stated in your letter, is exempt from State taxes pursuant to Act 107, General Acts of Alabama, 1936-37, page 113, for the years 1936-37 and subsequent years so long as it is occupied as a homestead.

Under Form 120, there has been an absolute sale of the property to the purchaser, although a deed thereto has not been delivered. The purchaser is the owner thereof in contemplation of law, and the seller, the Federal Land Bank, reserves title as security for the balance of the sale price. The pur-

chaser agrees to pay the taxes and the property may be lawfully assessed to him. The opinion in the case of **Thompson, Probate Judge v. Smith**, 174 So. 797, (Advance Sheet No. 6) from which I quote, is pertinent hereto. Justice Foster, speaking for the Court said as follows:

"1. We think the law requiring a deed tax applies if the instrument purports to be a sale on condition that the title shall not pass until a certain amount is paid, limited in amount by the proviso. It is not an instrument with a vendor's lien as commonly understood. That means literally a deed passing the title to such property, but reserving either expressly or impliedly a lien to secure the purchase money. This instrument does not reserve a lien as understood at law, but shows that the legal title is reserved for that purpose. But the purchaser is regarded as the owner, and the title is reserved as security. When a deed passes, the title with reservation of a lien to secure part of the purchase price, when some is paid in cash, it has been pointed out that the proviso shows an intention to make the deed tax applicable only as to the cash feature of the consideration. *State ex rel. Blue v. Stiles*, 212 Ala. 468, 102 So. 901."

It is not necessary that the claimant of a homestead own a legal title thereto. It is sufficient if he has an interest therein which is less than an estate in fee. **Tyler v. Jewitt**, 2 So. 905, 82 Ala. 93. Interest in realty acquired under an executory contract of sale is beneficial and is taxable. **Crow v. Outlaw**, 145 So. 133, 225 Ala. 656. Nature of title to homestead is immaterial. **Booker v. Booker**, 125 So. 212, 220 Ala. 367. Homestead right may attach to land held in fee or for life or a term of years. (Code of 1923, paragraph 7882). **Murphy v. Vaughan**, 147 So. 407, 226 Ala. 461. An interest pursuant to a contract of purchase is sufficient. **Burrow v. Clifton**, 65 So. 58, 186 Ala. 297. The lien for State taxes does not attach to a homestead as defined by the Constitution and laws of the State of Alabama, Act 107, General Acts of 1936-37, page 113. An owner of property is lawfully authorized to assess his interest in the same for ad valorem taxes. General Acts of the Extra Session, 1936, page 4. It is the duty of a person to list for taxation all property in which he has any interest. General Acts of Extra Session, 1936, page 4. Personal as well as real property in possession of a vendee under a conditional sale contract cannot be assessed as the vendors property, the vendee being the general and beneficial owner, **Ex Parte State**, 90 So. 1896, 206 Ala. 575, Cert. Den. The purchaser of the property from the Federal Land Bank has an assessable interest in the property, and if used as a homestead as defined by the Constitution and laws of Alabama, he is entitled to claim exemptions from the payment of State taxes.

The exemption should be allowed irrespective of the person to whom the property is assessed. It was the intent of the legislature to protect the homestead from being sold for the payment of State taxes. The property is nevertheless a homestead and its character as such is not changed even though it is wrongfully assessed to the Federal Land Bank of New Orleans. There is an obligation on the part of the purchaser to pay the taxes on the property which he bought. If the Federal Land Bank were required to pay the taxes, then under the terms of the contract of purchase, it would be entitled to reimbursement from the purchaser and thus he would be denied his exemption, such denial not being the intent of the legislature.

With further reference to exemption of property purchased under a lease sale contract, see opinion of this office dated April 27, 1937, to Hon. Roy Johnson, Tax Assessor, Jefferson County, Birmingham, Alabama.

If the occupancy as a homestead was begun after October 1, 1936, and no preparations for such occupancy made on or before October 1, of said year, then there would be no exemptions allowable for this current tax year.

With reference to your second question, it is my opinion that an interest in real property which is occupied by a person as a homestead pursuant to lease contract Form 519 referred to above, may be exempted from payment of State taxes before option to purchase is exercised, but the interest of owner, the Federal Land Bank, is not exempt. It is to be borne in mind that the assessment by the Federal Land Bank of property, which it owns, and which it has leased to a person pursuant to Form 519, supra, is an assessment by the bank of its interest in the property and is not to be confused with the interest of the lessee, under the lease agreement, which interest of said lessee may or may not be subject to assessment. A lessee may acquire homestead rights under a lease agreement and may be entitled to an exemption of his interest acquired under such lease agreement in which the property occupied by the lessee as a homestead is described. It is not necessary that a person shall have absolute title to property in order to entitle him to homestead exemptions under the Constitution and laws of Alabama, but an estate in property less than fee, may carry with it a homestead right. Code of Alabama, 1923, Section 7882. **Murphy v. Vaughan**, 147 So. 404, 226 Ala. 461; **Steiner v. Berney**, 30 So. 570, 130 Ala. 289. One may claim a homestead in land held under a lease. **Bailey v. Dunlap Mercantile Company**, 35 So. 451, 138 Ala. 415. Every person is required, under oath to render to the assessor a full and complete list of all property of which he was owner or in which he has any interest whatever. Act approved March 12, 1936. Extra Session, 1936, page 4. If the lessee has assessed his leasehold interest for taxation, he is entitled to homestead exemptions therefrom in area and assessed value according to Act 107, supra. If he has made no such assessment, but the land is assessed to the lessor, the Federal Land Bank of New Orleans, then the lessee is not entitled to claim homestead exemptions out of such assessment for the reason that the assessment of the bank is a distinct and separate assessment from the interest owned or acquired by the lessee. In other words, if the lessee has made no assessment of his leasehold interest in the property, which is usually the case according to information, then there is no assessment from which the lessee is authorized to claim an exemption. The assessment by the bank of its interest as owner of the property, therefore, must not be confused with an assessment by the lessee of his interest therein, and should not be exempted from payment of State taxes.

It is not here decided that a leasehold interest in property is subject to assessment for ad valorem taxes. If not, then there is no tax from the payment of which homestead exemptions operates.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 10, 1937.

Hon. T. D. Woodham,
Tax Assessor, Dale County,
Ozark, Alabama.

Homestead Exemption—Act No. 107, Special Session 1936-37, Legislature of Alabama.

(a) One of the two joint owners of farms occupied as homestead may claim fractional homestead exemption.

(b) Owner of farm who lives approximately five miles therefrom on five-acre tract is entitled to homestead exemption out of farm provided he cultivates both tracts in connection with each other and in common for the support of his family.

(c) Owner who cultivates farm, but resides in rented house located off of farm, is entitled to homestead exemption out of farm provided he cultivates both tracts in common and in connection with each other for the support of his family.

(d) Widow living on homestead of deceased husband who died intestate is entitled to claim homestead exemption out of property which she occupies.

(e) Joint tenant with others of unpartitioned real estate who occupies a portion thereof, is entitled to homestead exemption out of the joint property, but his fractional ownership of the homestead does not enlarge the area of its operation so as to make up in quantity what is wanting in extent of ownership.

(f) Husband who owns and occupies property as homestead which is assessed in the name of the wife may claim the homestead as exempt.

(g) A person who entered into a contract of purchase since October 1, 1936, and immediately went into possession may not claim homestead exemption for the tax year 1936-37, but may lawfully claim exemption for succeeding tax years.

(h) Wife may claim homestead exemption out of her property upon which she and her husband live, although husband owns contiguous tract.

(i) Husband may claim homestead exemption out of his property which he and his wife occupy, although wife owns contiguous tract.

(j) Husband and wife may claim homestead exemption out of property which he and his wife jointly own and occupy as a homestead, but not more than one homestead.

(k) A single person is entitled to claim an exemption as to homestead.

(l) Tax Assessor is not responsible for any losses accruing to the State of Alabama by reason of a false claim of homestead exemption, it not being his duty to ascertain the truth and correctness of such claim under oath.

Opinion by Assistant Attorney General Simmons.

Dear Sirs:

Reference is made to your inquiry of recent date, which I quote as follows:

"In complying with section number 31 of the 1935 Revenue Bill as amended by Special Act approved March 12, 1936, regarding homesteads, the following questions have arisen and I desire your official opinion on same.

"(a) John and Jack own 280 acre farm jointly. Should more than one homestead be allowed to them?

"(b) Owner personally cultivates a farm but lives approximately five miles therefrom on five acre tract conveniently located to the road. Is the owner entitled to a homestead out of the farm as well as the five acre tract.

"(c) Owner cultivates farm, but does not live thereon because there is no house. He rents a house located off the land. Can homestead lawfully be claimed out of the farm?

"(d) Widow lives on homestead of deceased husband. Is she entitled to claim a homestead on property which she occupies? Would the same thing be true as to husband who lives on real property owned by his deceased wife and which both of them occupied before her death?

"(e) What homestead would heirs to property be entitled provided each occupies and cultivates a portion of the property which he owns jointly with the other heirs? Please answer as to one heir and as to more than one heir so occupying the property?

"(f) Owner of homestead assesses property in name of wife. Which one may lawfully claim the homestead?

"(g) A entered into a contract of purchase with the Federal Land Bank of New Orleans since October 1, 1936, and immediately went into possession and began occupying the property as a homestead. The property was assessed in the name of the Federal Land Bank. Is such party entitled to claim a homestead in the property included in the contract of purchase?

"(h) Husband and wife each own 80 acres of land. The tracts are contiguous. If they live on the wife's property, out of what portion of the property should the homestead be carved? Please answer the same question if they live on the property of the husband.

"(i) Man and wife own joint title to property which they occupy as a homestead. What would be the homestead? Which one is entitled to claim the homestead?

"(j) Is a single person entitled to claim a homestead?

"(k) A taxpayer claims a homestead and makes a false affidavit in order to get it set out on his assessment. Can a Tax Assessor be held liable for any losses sustained by the State caused by granting a homestead under such circumstances?"

It is my opinion that two joint owners of a farm who occupy the same as a homestead may claim homestead exemption but only one such ex-

emption. Each owner has a fractional interest in the farm, and, therefore, has a fractional interest in the homestead.

The exemption of a homestead was provided by the legislature in its Special Session, 1936-37, Act No. 107, as follows:

"Section 1. The word 'homestead' as herein used is the 'homestead' as now defined by the Constitution laws of the State of Alabama."

"Section 2. Homesteads as herein defined are hereby exempt from all state ad valorem taxes beginning October 1, 1937."

"Section 3. In no case shall the exemption herein made apply to more than one person, head of the family, nor shall said exemption exceed Two Thousand Dollars (\$2,000) in assessed value, nor more than One Hundred Sixty (160) acres in area." (Approved February 20, 1937.)

Each of the two joint tenants who occupy the land would be entitled to an exemption not exceeding One Thousand Dollars each in assessed value provided the homestead does not exceed in area One Hundred Sixty (160) acres nor in assessed value the sum of Two Thousand Dollars. If the assessed value of the homestead is Two Thousand Dollars or less, then each of the two joint owners would be entitled to an exemption of one-half of the assessed value. I defer further discussion of such exemption at this time for the reason that your letter again presents the same subject which I later discuss in this opinion with citation of authorities. See opinion to Hon. O. S. Nichols, Marion, Alabama dated July 8, 1937.

(b) It is my opinion that the owner of the farm who lives approximately five miles therefrom on a five-acre tract is entitled to homestead exemption out of the farm, provided he cultivates said lands in connection with each other and in common for the support of his family. It was said in the case of **Dicus v. Hall, Hooper and Co.**, 83 Ala. 159, 3 So. 239, that "Where the debtor resides on a tract of land containing sixty acres, and purchases another tract containing 80 acres, from which he obtains timber and firewood for the homeplace, cultivating the two places together, and obtaining his supplies from both, the two tracts together being of less value than \$2,000; the purchased tract may be claimed as a part of his homestead exemption, although separated from the homeplace by an intervening tract six hundred yards wide." See also **Shubert v. Winston**, 11 So. 200, 95 Ala. 514, in which it was held that "Land which is cultivated in connection with other land, upon which the owner resides, and which with the other, is a source of family support, constitutes a part of the homestead, although it be not contiguous thereto." You should determine whether or not the owner of the property cultivates both tracts in connection with each other and in common for family support, as the existence of such facts determines the status of the property as a homestead. The cultivation of the lands in the manner indicated in the opinion from which I have quoted is tantamount to actual occupation thereof as required by law.

(c) It is my opinion, in answer to question (c), in which you state that the owner of the farm lives in a rented house off the premises and you ask if this farm is exempt as his homestead, should be answered in the affirmative, provided the claimant of the owned and rented premises cultivate both tracts in connection with each other and in common for the support of his family. **Dicus v. Hall, Hooper and Company**, supra. **Shubert v. Winston**, supra. The Supreme Court of Alabama in the case of **Bailey v. Dunlap Mercantile Company**, 138 Ala. 415, pertinent to the question (c) had the following to say:

"The writ of attachment was sued out on the 5th day of December, 1901, and levied upon the lands in controversy two days later. At and prior to the day of the levy, the defendant, with his family, was residing upon a forty acre tract of land which he had rented from one Costello for the years 1901 and 1902. He had previous to the levy of the attachment purchased the two pieces of land levied upon, both of which were contiguous to and adjoined the leased premises upon which he resided. One of the parcels, comprising forty-five acres, he acquired from one Remley; the other, comprising thirty-five acres, he acquired from Costello—making the entire tract, including the rented lands, one hundred and twenty acres.

"It is of no consequence what the character of his estate in any portion of the one hundred and twenty acre tract was or may have been at the date of the levy. So he had an estate in that portion of the tract upon which he resided, whether a fee or less, is all that is required, provided it was the dwelling place of his family and was used and occupied as such.—Section 2033 of the Code. 'There is no limitation to any particular estate, either as to duration, quality or extent. It is the land upon which the dwelling place of the family is located, used and occupied as a home, which the constitution and statute protects, however inferior may be the title, or limited the estate or interest.'—Tyler v. Jewell, 82 Ala. 93; Griffin v. Chattanooga Sou. R. R. Co., 127 Ala. 570. Nor can it be of consequence that defendant acquired the tract in parcels at different times or that his estate in each parcel may be different in degrees.—Waples on Homestead and Exemptions, par 9, 115. He is, as against the plaintiffs, the owner of the tract in its entirety and if, as here, the entire tract, does not exceed one hundred and sixty acres and two thousand dollars in value, the whole of it is his homestead and exempt from the payment of his debts. Nor is it of importance that tenants may have occupied, at the date of the levy of the attachment, a portion of the parcels acquired from Remley and Costello. The owner of a homestead may, if he chooses, rent out a portion of the tract without subjecting the portion so rented to the payment of his debts."

Referring to your question (d) it is my opinion that a widow who lives on a homestead of a deceased husband who died intestate is entitled to claim homestead exemption out of the property she occupies. The widow, until her dower is set aside, is entitled to quarantine rights authorized by Section 7437, Code of Alabama, 1923. The use of the property by the widow pending dower as authorized by the foregoing Code Section is such a beneficial interest in the property as in my judgment entitles the widow to claim exemption from taxes on a homestead. She is entitled to homestead exemption which should be set aside to her in the manner provided by law, and in my judgment, so far as exemption from taxes on the homestead is concerned, the use of the property to which the widow is entitled is nothing more than due recognition of such homestead rights although there is no definite determination thereof by metes and bounds.

I am not answering the second question contained in paragraph (d) of your letter for the reason that the facts stated in that question are insufficient. In order for me to reach a correct conclusion, it will be necessary for you to tell me whether or not the widow left other lands which are not connected with the premises occupied by the husband.

Answering question (e) of your request, it is my opinion that an heir to unpartitioned real estate who occupies and cultivates a portion of the property which he jointly owns with other heirs is entitled to homestead ex-

emption out of said property, but his fractional ownership of the homestead "does not enlarge the area of its operation, so as to make up in quantity, what is wanting in extent of ownership."

Justice Stone in speaking for the Court in the case of *Snedecor v. Freeman*, 71 Ala. 140, after making due reference to *McGuire v. Van Pelt*, 55 Ala. 344, said as follows:

"We settled in those cases that the fractional ownership of the claimant of homestead did not enlarge the area of its operation, so as to make up in quantity, what is wanting in extent of ownership. We ruled that the homestead claim is limited to the quantity the statute or constitution prescribes; and that the claim is valid only for such interest, both in extent and duration of ownership, as the claimant owns. If the ownership be fractional, or less than a fee, then the exemption is fractional, and continuous only so long as the title of the owner and occupant lasts. The homesteads in these cases being governed by the constitution of 1868, and in quantity not to exceed eighty acres, it follows that whatever homestead interest the plaintiffs could claim in these cases, must be confined to the extent of ownership each of them had in a separate eighty acres. The testimony shows they were each of them entitled to an undivided one-eighth interest in the tract; therefore, the homestead can not exceed an undivided eighth interest in eighty acres, so selected as to include the actual homestead of the claimant. In overlooking the principle declared above, the Circuit Court was betrayed into some important errors. The whole tract of land contained four hundred acres, and it is not shown it was ever partitioned. The claims of these plaintiffs are each limited to eighty acres—one hundred and sixty acres for the two. Whatever interest they had in the remaining two hundred and forty acres, they could not claim as homestead."

I am assuming from your inquiry that the land which is owned jointly by the heirs has never been partitioned in accordance with law, or by agreement, and further, I assume that the occupancy is joint. If such are the facts, then only the heirs occupying the property are entitled to any homestead exemption. As an example, if there are five heirs to the property, four of whom live thereon, and the other one does not, but resides some distance away and does not cultivate the land or any portion thereof, then only the four heirs would be entitled to the homestead exemptions and their ownership in the property would not enlarge the area of the homestead operations. Only one homestead exemption, conforming to lawful area and assessed value, could be granted in the unpartitioned property. Each of the four heirs residing on the property would be entitled to an exemption of one-fifth of the lawful exemption, but not exceeding in one-fifth of two thousand dollars. The heir who does not reside on the land, and cultivates no portion thereof, would not be entitled to any exemption. In the example I have just given, the four heirs would be entitled to an exemption of Sixteen Hundred Dollars, that is, provided the assessed value amounts to Two Thousand Dollars. This rule has application to an unlimited number of joint tenants. As a further example, if the land occupied by two joint tenants, which has never been partitioned is assessed at Two Thousand Dollars, each of the joint tenants would be entitled to an exemption of One Thousand Dollars as to payment of taxes. See opinion of this office to Hon. O. S. Nichols, Marion, Alabama, dated July 8, 1937.

Referring to the facts presented in question (f), it is my opinion that a husband who owns and occupies property as a homestead, which is assessed in the name of the wife, may claim the homestead as exempt. It was the

intention of the legislature to exempt the homestead and not to deny that right just because the property happens to be wrongfully assessed, or assessed in the name of the wrong party.

According to the facts presented in question (g) of your inquiry, it is my opinion that such person who entered into a contract of purchase with the Federal Land Bank of New Orleans after October 1, 1936, going into possession of the property, could not be lawfully entitled to an exemption of such homestead from the payment of taxes assessed on October 1, 1936, but only for succeeding tax years. The property did not have an exempt status at the time a State lien for taxes attached, that is, it was not a homestead at that time, and therefore is not entitled to exemption. It must be a bona fide homestead at the time the tax lien attaches.

In answer to question (h) of your letter, it is my opinion that the husband may claim a homestead exemption out of his property which he and his wife occupy, although his wife owns a contiguous tract. This contiguous tract of the wife would not be a part of the homestead. Also, the husband and wife occupy land belonging to the latter, the wife would lawfully be entitled to claim such occupied land as a homestead, but she could not include the contiguous tract belonging to her husband. **Beard v. Johnson**, 87 Ala. 729, p. 732, I quote as follows:

"In the case before us, the homestead, or family residence, was on the lands of the wife. The husband owned adjoining lands, cultivated a portion of them in connection with his wife's tract, and put the residue to rent, by annual lettings. The two tracts combined were twenty acres in excess of the greatest quantity allowed as an exempt homestead—one hundred and sixty acres. The wife's land was the homestead, and if claimed, was clearly exempt from any debt due by her. She owned it, and, together with the family, occupied it. We think it is manifestly against both the letter and the spirit of the law, that the two holdings, being not in common, but by different persons, should be tacked, the one to the other, and thus become an individual homestead, claimable by either. She, owning, and, together with the family, occupying the homestead proper—the land on which they resided—was, without doubt, entitled to claim the exemption from debts. This disabled him, so long as that ownership and occupancy lasted, to assert homestead in other lands, on which the family did not reside."

Answering question (i), it is my opinion that the husband and wife are entitled to a homestead, but not to exceed \$1,000.00 in assessed value for each. The answer herein to question (a) hereof is applicable; also the reasons set forth in answer to question (e) have application.

It is my opinion that the exemption is applicable to a homestead of a single person. Section 3 of the Act exempting the homesteads says that the exemption shall apply only to one person, head of a family. The words "head of a family" are in my judgment, intended to be construed along with the restriction of the exemption to one person, both statements having the effect to restrict one exemption to a family. It was not the intention of the Legislature to permit more than one member of a family to claim an exemption, nor was it the intention of the Legislature to deny a single person, although not connected with a family, the right to claim a homestead.

It is further my opinion that the tax assessor is not responsible for any losses accruing to the State of Alabama by reason of a false claim for a homestead exemption. The Legislature imposed upon the tax assessor the

duty of listing and valuing the homestead separately from other property. See Act approved March 12, 1936, (Acts Ala. Ex. Sess. 1936, p. 4). The tax assessor is required to administer the oath to the person making the return of the property for taxation and also claiming the homestead exemptions. Revenue Laws of Alabama, 1935, Section 32. Section 33 of the same Revenue Act imposes upon the tax assessor, the duty of making inquiry of a taxpayer as to the items of property subject to taxation owned by him. I cannot find from examination of the law which imposes duties upon the tax assessor, or from recent enactment with reference to homestead exemptions, that the legislature at any time has imposed upon the tax assessor the duty of ascertaining the truth and correctness of the taxpayer's claim for a homestead exemption. If the verified claim which the taxpayer is required to make is false and a loss accrues to the State of Alabama by reason thereof, the tax assessor is not responsible therefor, but upon ascertainment of such false claim, within five years, he must assess the property as an escape.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 11, 1937.

Hon. J. A. Keller,
Superintendent of Education,
State of Alabama
Montgomery, Alabama.

County Board of Education may compromise with contractor for damages due to delay in commencing building operations on school.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"It appears that the J. D. McEaddy Building Construction Company entered into a contract on November 6, 1935, to build two buildings for the Marshall County Board of Education. The contract bid on these buildings was \$11,460 for the one at Mt. Hebron and \$1,337 for the addition at Douglas. There was some delay in getting the project started, due to certain Public Works Administration regulations. In the meantime, the cost of building materials had advanced and the McEaddy Building Construction Company protested to the county board of education. The county superintendent agreed that in the event the construction company lost money on the contract he would recommend that the county board of education assume at least half the loss, provided he could be assured of the legality of such a payment in addition to the contract prices set out above. The building company, meanwhile, has completed its contract and received full payment. It is requesting the county board of education to pay it \$350 in addition to the contract price.

"Attached hereto are papers which will show you the complete history of the case. I shall thank you to return these papers for our files when you deliver your opinion on the following questions:

"1. Should the Marshall County Board of Education pay the claim of the J. A. McEaddy Building Construction Company?

"2. Should the County Board now authorize such payment, would it be a legal expenditure?

"3. Would such a payment become a charge against the County Superintendent and his bondsmen?"

To give you a proper answer to this question I have found it necessary to secure the original contract and other papers, since a proper decision depends entirely on the facts and there are many facts which are not fully set out in your letter. From these original papers it seems that the J. D. McEaddy Building Company submitted a bid to construct two school buildings, which bid was dated November 6, 1935, and provided:

"It is hereby agreed that the award of the contract shall be conditioned upon funds being made available from the Federal Emergency Administration of Public Works, and upon the applicant having the right to hold the bids for a period of thirty days from the date of opening thereof."

Within the thirty days formal contract was executed, dated December 5, 1935, which contract, however, provided:

"This contract shall not be effective until it has been approved by the State Director of the Public Works Administration of the State of Alabama."

Such approval by the State Director of the Public Works Administration was eventually granted on April 1, 1936. It also appears that the contractor had executed a subcontract for its lumber, but on account of advance in prices of lumber the subcontractor withdrew his offer in writing on February 5, 1936, prior to the approval of the contract by the PWA. As a result thereof, at the time of the approval the McEaddy Construction Company was required to pay a higher price for lumber to go into the building.

Under these circumstances, before the contractor would commence work, he submitted a claim for the additional amount of \$673.51, representing the difference in the price of lumber contained in his original subcontract and the price obtainable in April, 1936. Had a definite and binding agreement been made at that time to induce the contractor to continue performance of his contract, in my opinion the Board would be bound by such agreement. However, further letters indicate that pending advices from the Public Works Administration, the County Board of Education notified the contractor:

"Please let us know if you are willing to proceed with work on these buildings and leave the decision on your claim to future developments. If you feel that you cannot proceed with work on this basis, let us know if you prefer release from the contract."

On May 19 the contractor addressed a letter purporting to confirm a conversation and agreement with the County School Superintendent, to members of the School Board and the architect, in which it is stated:

"It is understood that in consideration of the writer starting work on the Marshall County school jobs without further delay, subject only to approval of change order No. 1 by Mr. Geismar representing the PWA, you as architect, and the County School Board of Marshall County as owner, agree to give the undersigned the privilege of using as the original lumber specifications all the specifications set out in Change Order No.

"1 on the lumber for those jobs. It is also understood that toilets of the Mt. Hebron School are to be entirely omitted from the contract. It is further understood that there is to be no change in the original contract price on these jobs on account of the items set out above. It is also understood that the changes noted above are final and binding on both parties and the writer agrees to make no further claim on account of advances in materials or labor and that the School Board agrees to make no claim on account of any advantages the writer may obtain in the purchase of his materials or the closing of subcontracts on this work. In other words, it is understood that the whole matter is in the nature of a compromise agreement and is agreeable to both writer and the Marshall County School Board."

Whether there was any new binding agreement to this effect seems to be doubtful for in Mr. Clay's letter it is stated that it was understood that the construction of the toilets on the Mt. Hebron job was conditioned on the omission being approved by the PWA and that this change order was rejected by the Director of the PWA.

As I construe your first question, it is whether the Marshall County Board of Education is under a legal liability to pay the J. E. McEaddy Construction Company the sum of \$350.00. This Question is entirely one of fact and from the facts given to me I am not able to say that the Marshall County Board of Education is under such legal obligation. It is the general law that a promise to pay a building contractor additional compensation for performance of a contract which he is already under obligation to perform is invalid because without consideration. *Shriner v. Craft*, 166 Ala. 146, 51 So. 884, 28 L. R. A. (N. S.) 450.

Courts of many states recognize an exception to this rule in the case of unanticipated difficulties. *United States v. Cook*, 257 U. S. 523, 66 L. Ed. 350, 42 Sup. Ct. Rep. 200; Annotation, 25 A. L. R. 1459.

If the promise of additional compensation is not a mere promise to pay an additional sum for performance of that which the contractor was already bound to perform, but is a compromise of a disputed claim, it is uniformly held that there is sufficient consideration for the promise of additional compensation. 25 A. L. R. 1468, and numerous cases there cited.

It is also well settled that if the owner of the premises delays a contractor in the performance of his contract, the contractor is entitled to the damages naturally arising from such delay and the election of the contractor to continue performance in spite of the delay does not deprive him of the right to damages therefor. 2 Williston on Contracts, Section 704, page 1358; *Louisville, etc. R. R. Co. v. Hollerback*, 105 Ind. 137, 5 N. E. 28; *Weeks v. Rector*, 26 N. Y. App. Div. 195, 67 N. Y. Supp. 370.

Applying these principles of law to the facts which I have been able to gather from your letter and from the documents furnished, in the event the delay in starting work has been caused by the fault of the Marshall County Board of Education in my opinion the contractor would have a valid claim against the county. Since, however, the contract was conditioned on its approval by the Public Works Administration and such delay was entirely in obtaining such approval and without the fault of the Marshall County Board of Education, the contractor is not entitled to a claim on this ground.

If a valid and binding agreement was made by or on behalf of the County Board of Education to pay the sum of \$350.00 to induce the con-

tractor to proceed with a contract from which the County Board of Education recognized he might have been released by reason of the delay, in my opinion the contractor would have a valid legal claim for such amount. As to whether there was such an agreement, there seems to be a dispute of fact, McEaddy apparently claims such a binding agreement to omit the toilets, the price of which was \$350.00, while the Superintendent of Education states that such agreement was subject entirely to the approval of the PWA. Under such circumstances, I am not able to say that the contractor has a binding and valid claim. It is my suggestion that if the contractor wishes to enforce such claim and feels that he has further facts entitling him to recover, that the matter should be submitted to the proper tribunal for the decision of such disputed facts.

Your next question is whether, if the County Board should authorize such payment, it would be a legal expenditure. In my opinion, this question should be answered in the affirmative. Such payment would be in the nature of a compromise of a disputed claim for a larger amount. The County Board of Education has the power to contract and to sue and be sued and in my opinion they have authority to compromise a disputed claim and such compromise would be a lawful expenditure.

Your third question is whether such payment would become a charge against the County Superintendent and the sureties on his bond. This question is necessarily answered in the negative. If the expenditure is a legal expenditure in compromise, it would not become a claim against the County Superintendent. It seems that the Superintendent is somewhat worried for fear any payment would be on account of an agreement made by him with the contractor. If such agreement was made and was in excess of the authority of the County Superintendent of Education, it would not be binding upon the County Board and any payment made by the County Board would therefore not be the result of an unauthorized act of the County Superintendent of Education and would not become a charge against him.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 11, 1937.

Dr. J. A. Keller, Superintendent,
Department of Education,
Montgomery, Alabama.

Schools—proper distribution of appropriation of \$2400 to provide for educational opportunities for the children of soldiers, sailors and marines who were killed in action or died during the World War, under Act No. 640, H. 1195, approved August 1, 1931, Gen. Acts 1931, p. 775, and Act No. 136, S. 64, approved February 24, 1937, Gen. Acts 1936-37, p. 152, is one of administration to be determined by the State Board of Education.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 21, 1937, which is as follows:

"It now appears that there will be more applicants for the benefits of the World War Orphan Scholarship Act than the appropriation will care for. The present legislature in recent special session made an appropriation of \$2400 annually for carrying out the purposes of the act. The act states that each child may receive \$150 a year. The \$2400 annual appropriation will, therefore, care for only eighteen students enrolled in college, as each college student will use the full amount.

"Please advise me if this office should approve only the first eighteen applicants and make payment for the full amount for each child as provided for in the Act. If this procedure should not be followed, please advise if this office should notify each applicant that the \$2400 will be prorated among the total number who enroll in state schools to receive the benefits of the act. It appears to me that one of the two above procedures must be followed, if the act is to be properly administered."

Act No. 640, H. 1195, approved August 1, 1931, provides for educational opportunities for the children of soldiers, sailors, and marines who were killed in action or died during the World War, provides an appropriation therefor and defines its use and administration. Act. No. 136, S. 64, approved February 24, 1937, merely provides for the appropriation of \$2400 per annum, as set out in Section 3 of the 1931 Act.

Section 1 of the 1931 Act provides the qualifications of the applicants who are entitled to receive the benefits of the appropriation in question.

Section 2 provides that the State Board of Education shall determine the eligibility of the applicants, etc. Section 3 provides for the appropriation and further provides that not more than \$150.00 shall be paid for any one child for any one year.

The Act is silent as to the exact administration of the \$2400 as regards the proper distribution thereof. The only limitation placed on the distribution is that not more than \$150.00 shall be paid for any one child for any one year. Reading the Act as a whole, the State Board of Education is given authority to administer the provisions of the Act subject only to the limitations set out therein. Since there is no limitation as to the proper distribution of the appropriation (other than the maximum allowance of \$150.00 for any one child for any one year), it is my judgment that the State Board of Education may distribute the said \$2400 in any manner it may deem proper to better effectuate the purpose of the Act. In other words, the matter of your inquiry is one of administration that addresses itself to the State Board of Education.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 11, 1937.

Hon. L. J. Lewis,
Member, Board of Revenue,
Russell County,
Seale, Alabama.

Deputy Clerk of Russell County under a local Act, approved August 11, 1927, (Local Acts, 1927, page 175), said deputy being appointed by the Clerk and only certified to the Board of Revenue

of Russell County for the purpose of fixing salary does not come under Section 5076, Code of Alabama, 1923, and a member of the Board of Revenue who is an uncle to the deputy so appointed would not be prohibited from voting on the sole question of fixing his salary.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 10, 1937, in which you ask reconsideration of an opinion of this office written May 14, 1937, addressed to you. Your request reads as follows:

"On May 14, 1937, your office rendered an opinion to me with reference to a relative of a Member of the Commissioner's Court being employed to perform services for the Clerk of the Circuit Court. Opinion by Assistant Attorney General Haynes.

"From the opinion rendered I feel that your office did not exactly understand the question I propounded or I did not go into the matter fully enough. For that reason I am asking for a reconsideration of the opinion. I am setting out the facts below and giving my reasons for the reconsideration.

"On August 11, 1927, a Local Act was approved by the Governor of Alabama wherein the Clerk of the Circuit Court of Russell County was authorized and instructed to appoint a Deputy Clerk to serve at the branch courthouse in Russell County. This Act is found on pages 175 and 182, inclusive, Local Acts of 1927.

"Upon this Act becoming a law the Clerk of the Circuit Court of Russell County appointed Mr. L. L. Pitts of Seale, Alabama, as Deputy Clerk for the branch courthouse. He certified this appointment to the Board of Revenue of Russell County as provided in the Local Act referred to above and asked the Board of Revenue to fix his compensation for said Deputy Clerk, which they did.

"Mr. Pitts has served for more than two years as said Deputy and has drawn his salary as provided in the Act. On Jan. 17, 1937, I became a Member of the County Commission of Russell County. Mr. Pitts, being my nephew, I refused to vote on his salary claim each month since your opinion.

"Section 5076 of the Code of Alabama of 1923 states that no member of any Commissioners Court or Board of Revenue in this State shall award a contract to any person related by blood or marriage within the fourth degree to such commissioner or shall employ any relative to do any work for any County in this State.

"Under the conditions set out in the above section of the Code the County Commissioners of Russell County did not enter into any contract with the said L. L. Pitts but the Clerk of the Circuit Court of Russell County entered into the contract as provided by the Local Act referred to above.

"The question that I would like to have you answer is, have I, as an Uncle of Mr. L. L. Pitts, the right to vote to pay his salary as such deputy under the condition set out above."

The opinion you refer to from this office of May 14, 1937, which was addressed to you as Member of the Board of Revenue of Russell County is correct as construing the General Law of the State and as was decided in the case of **Garrison, Probate Judge v. Summers**, 134, So. 675. But on reconsideration of this opinion in connection with your Local Act of 1927, (Local Acts, 1927, page 175), we are of the opinion that since the Clerk of the Circuit Court under Section 19 of the Local Act of 1927, *supra*, which section requires the deputy appointed by the Clerk of the Circuit Court be certified by him to the Board of Revenue and when so certified, the Board of Revenue must fix his salary not to exceed \$1200.00 per year. This being true, Local Act, *supra*, takes the matter from under the operation of Section 5076, Code of Alabama, 1923, as the contract with the deputy is not made with the Board of Revenue, but by the Clerk of the Circuit Court and the name of the deputy clerk so appointed by you is only certified to the Board of Revenue for the sole purpose of fixing his salary, the contract and appointment having previously been made by the Clerk of the Circuit Court.

So we are of the opinion and so hold the fact that you as Member of the Board of Revenue of Russell County are an uncle of the deputy clerk so appointed would not prevent you from voting on the question of fixing the salary of said deputy clerk.

The original opinion written to you on May 14, 1937, Office Edition, Book 16-A, Attorney General's Opinions, is hereby overruled and withdrawn.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 11, 1937.

Hon. J. A. Keller,
Superintendent of Education,
Montgomery, Alabama.

Revolving Fund—

Not exceeding twenty per cent of Revolving Fund may be used in employing school architects and draftsmen, employing temperance workers, and furnishing school registers and other printed materials, under conditions set fourth in request.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter in which you make the following inquiries:

"1. Can the State Board of Education use a portion of the twenty per cent of the Revolving Fund for the purpose of employing school architects and draftsmen to furnish schoolhouse plans and inspection service to county boards of education?

"2. Can the State Board of Education use a portion of the twenty per cent of the Revolving Fund for the purpose of employing a temperance worker to assist boards of education in promoting temperance instruction in their schools?

"3. Can the State Board of Education use a portion of the twenty per cent of the Revolving Fund for the purpose of furnishing school registers, accounting forms, and other printed materials which are needed in the public schools of the State?

"Neither county boards of education, nor city boards of education, nor the State Board of Education have adequate appropriations to provide the services set forth in the three questions listed above. Appropriations for 'Other Current Expenses' and for 'Capital Outlay' to county and city boards of education were reduced approximately seventeen per cent during 1936-37 in order to provide for additional teachers that were necessary for these boards to employ due to increased school attendance. The regular appropriation to the State Board of Education for the purpose of supporting the State Department of Education is all budgeted and is inadequate to provide the additional services described in the questions asked."

I am of the opinion that each of your questions should be answered in the affirmative.

Section 2 of an Act approved September 2, 1935, 1935 General Acts, page 751, makes provision for a Revolving Fund which is "to be expended in relieving emergency conditions that arise in connection with the operation of the public schools or in otherwise aiding the public schools, and to be expended in accordance with the provisions of the statutes relating to the expenditure of such funds." (Emphasis ours).

Section 59 of the 1927 Alabama School Code provides as follows:

"The State Board of Education is specifically charged with the duty of equalizing public school facilities throughout the State, in so far as it may be practicable; and in order to make it possible to increase the length of school terms in rural districts, and to care for that and other worthy purposes for which no adequate appropriation has been made, the said State Board of Education shall expend so much as it may deem proper of the amount set aside annually by legislative enactment as a revolving fund for the use of the State Board of Education, provided at least eighty per cent of the amount appropriated, if used, shall be expended for lengthening of public school terms and otherwise bettering conditions in rural schools, and that any unexpended balance at the end of any fiscal year shall be placed to the credit of the General Educational Fund."

The primary limitation placed upon the expenditure of twenty per cent of this fund is that it shall be used for worthy purposes "for which no adequate appropriation has been made," and in "aiding the public schools".

I am of the opinion that each of the purposes set out by you is in aid of public schools, and you state in your request that the funds otherwise available for these purposes are inadequate.

I am of the opinion that not exceeding twenty per cent of the Revolving Fund may be spent for the purposes suggested by you, under the restrictions prescribed in Section 59 of the 1927 School Code.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 12, 1937.

Hon. J. E. McAdory,
Deputy Assessor,
Jefferson County, Bessemer Division,
Bessemer, Alabama.

Taxation—Homestead exemption—Act No. 107, Special Session,
1936-1937.

Property which is primarily used as a homestead, although secondarily used for commercial purposes, is exempt from State taxes, but if aforementioned use is reversed, then it is not exempt.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry which I quote as follows:

"A party builds a two-story home with a basement and this party occupies the downstairs and rents the upstairs unfurnished, also a room in the basement. The party renting the upstairs cooks, eats and sleeps. Is this classified as an apartment house, or is it simply a home and would the owner be entitled to Homestead Exemption?

"Also, a party built a two-story home and later made a separate entrance to go upstairs and rents the several rooms to different people. Is this classified as an apartment or is it considered a home?

The dominant use of the property is the controlling factor in determining whether real property, used both for commercial purposes and as a homestead, is exempt under the provisions of Act No. 107, Special Session, 1936-1937, authorizing exemption of homesteads from State Ad valorem taxes. I quote from several pertinent decisions in Alabama dealing with this subject.

"A house built in the business part of a town, and used principally as a store building, though the owner sleeps in a small back room and takes his meals elsewhere, is not a homestead." *Garrett v. Jones, Jones*, 10 So. 702, 95 Ala. 96.

"A homestead may not be claimed in premises used as a hotel."—*Turner v. Turner*, 18 So. 210, 107 Ala. 465, 54 Am. St. Rep. 110.

"A building built for and used as a storehouse cannot be claimed as a homestead, though the owner may have resided therein in connection with his business."—*Bell v. Anniston Hardware Co.* 21 So. 414, 114 Ala. 341.

"Where upon a lot on which is erected the dwelling of the owner, which is occupied and used by him as a homestead, there is erected a storehouse, which is used for the selling of merchandise, but the said lot, together with the dwelling and the storehouse, does not exceed the statutory value of a homestead, and the store is used only secondary to the occupation of the lot as a homestead, the erection of said storehouse does not prevent the owner from claiming said lot as a homestead exemption."—*Marx v. Thomas*, 30 So. 831, 131 Ala. 340.

"To be exempt as a homestead, the premises must be occupied in good faith as a home, rather than as a source of income."—*Mullins v. Baker*, 69 So. 516, 193 Ala. 594.

The primary and secondary uses of the property are questions of fact for you to determine in each case. You may ascertain the facts by employment of such reasonable methods as you deem necessary and expedient, and you will then weigh the facts in accordance with the legal principles laid down by the courts that the primary use of the property determines the exemption.—Opinion of this office to Mr. Frank Pearce, Tax Assessor, Marion County, Hamilton, Ala, dated July 6, 1937.

With reference to the first paragraph of your letter, in the absence of additional facts available to you, if any, which would color the situation, it is my view and judgment that the mere renting of the upstairs, unfurnished, and a room in the basement, does not deny the property of its character and dominant use as a homestead. The homestead law will be liberally construed to effectuate its design.—*Boyte v. Perkins*, 99 So. 652, 211 Ala. 130 Act No. 107, supra, granting homestead exemptions. (Section 1) reads as follows:

“The word ‘homestead’ as herein used is the ‘homestead’ as now defined by the Constitution and laws of the State of Alabama.”

Referring to your second question, the facts that you present indicate that the property is primarily used as a homestead and that the repair of the house so that the upstairs, provided with a separate entrance, may be rented to occupants is of secondary importance. I do not think that this property, primarily used as a homestead prior to the repairs, lost its dominant use by the conversion of the upstairs into a source of revenue. If the house had been originally built primarily for commercial use, exemption thereof as a homestead would be doubtful.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 12, 1937.

Dr. A. H. Collins, Commissioner,
Department of Public Welfare
Montgomery, Alabama

Pensions—Confederate Pension warrant payable to the pensioner who is temporarily out of the State, may be delivered through the United States mail and enclosure in envelope properly sealed and addressed to pensioner with delivery thereof restricted to pensioner, who must in person sign return receipt.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your communication of recent date which is as follows:

“Please give me your opinion as to whether the delivery of a Confederate Pension warrant can be made in any manner other than to the payee in person. I call your attention to Section 2957 of the Code of Alabama, 1923, as amended by Act No. 172, approved March 1, 1937.

“Can a Confederate pensioner who is temporarily domiciled in some other state but is still a resident citizen of Alabama continue to receive his or her pension warrant? If the answer is affirmative, in what man-

ner can delivery of warrant be made to pensioner? Section 2959 of the Code of Alabama, 1923, as amended in 1937 by Act No. 172, provides the manner in which delivery of the warrant can be made in case a pensioner is physically unable to appear before the County Director of Public Welfare, but this section appears to provide for the method of payment only when the disabled pensioner is actually within the county.

"Section 2961 provides that the pensioner shall be dropped from the pension rolls when he or she becomes a resident citizen of another state, and further prohibits the delivery of the pension warrant to any payee who is at the time of such delivery 'residing outside the state' and has 'no fixed abode within the state.' This section also provides that in case of absence from any cause for a **period of twelve months** the name of the pensioner shall be stricken from the pension roll.

"The following cases are cited as examples of some of the questions raised by pensioners:

"(1) Is not a pensioner who maintains his or her legal residence, pays taxes and votes in Alabama, but who spends his or her winter in Florida for his or her health, entitled to pension warrant while in Florida?

"(2) Can a pensioner who maintains his or her residence in some Alabama county either with a relative or in his or her own home, but who is visiting temporarily in another state at the beginning of the quarter when the checks are payable, receive his or her warrant by mail before returning to his or her county of residence?

"For your information I may say that a number of Confederate Pensioners visit about among their relatives, some of whom live in other states and on April 1, when the County Departments of Public Welfare delivered the pension warrants, they had many requests to mail the warrants, either directly or through a friend or relative, to the absent pensioner. I am wondering if it was the intent of the legislature to withhold the pension from these pensioners simply because the warrants cannot be delivered **in person** by the County Department of Public Welfare.

"In this connection, I wish to call your attention to an opinion of the Attorney General delivered January 12, 1932, in answer to an inquiry of Hon. E. W. Pettus, of Selma, Alabama, in which the Attorney General held as follows:

" 'It is my opinion that Mrs. Alexina F. Hooker's name should be reinstated on the pension roll of the State of Alabama. The fact that she is temporarily absent from the State being treated for her malady in the State of Georgia does not disqualify her from drawing the pension she would otherwise be entitled to. I do not think the Legislature in the passage of Section 2961, Code of Alabama, 1923, had in contemplation that should any soldier, sailor or widow of a Confederate Soldier who is entitled to draw a pension under the provisions of Chapter 55, Code of Alabama, 1923, merely temporarily going into another state for treatment at a hospital, forfeit his or her right to remain on the pension roll of this State. Therefore, it is my opinion that Mrs. Hooker should be re-instated and permitted to draw her Confederate Pension under the laws of this State. To hold otherwise would place upon these old Veterans and their widows the burden of having to remain at home and suffer when by going to another state they might find relief. There-

"fore, as stated above I do not believe that the Legislature in the passage of our Confederate pension laws intended that a pensioner should be cut off by strict technical rulings such as we have in this case."

"I also wish to call your attention in this connection to an opinion delivered by the Attorney General of May 6, 1932, in reply to an inquiry from Hon. G. H. Howard, Judge of Probate, Wetumpka, Alabama, in which the Attorney General said:

"I beg to advise that in my opinion there is no authority of law under which a Probate Judge may deliver a pension warrant where the pensioner is not living in the County at the time of such delivery."

"As I understand it, the law passed by the recent special session of the Legislature merely transferred certain functions and responsibilities in connection with the payment of Confederate pensions to the State Department of Public Welfare and from the probate judge to the county departments of public welfare and did not otherwise change the manner of the delivery of pension warrants."

Act No. 172, Special Session of the Legislature, 1936-37, imposes upon the County Department of Public Welfare the responsibility of receiving and delivering pension warrants which authority was formerly vested in the probate judges in the State of Alabama. See Section 2957, Code of Alabama, 1923.

Sections 2 and 5 of said Act No. 172 read as follows:

"Section 2. The county departments of public welfare are hereby vested with the duty of receiving and delivering the warrants drawn by the State Department of Public Welfare to the pensioners located in their respective counties."

"Section 5. It is not the purpose or intent of this Act to deprive the Probate Judge of any duties now imposed upon him by law in connection with Confederate Pensioners other than to relieve him of the duty of receiving and delivering the pension warrants issued by the State Department of Public Welfare. All of the duties heretofore vested in the Probate Judge in connection with the receipt and delivery of pension warrants, are, however, imposed by this Act upon the County Department of Public Welfare."

The County Department of Public Welfare is charged with the responsibility of receiving and delivering said pension warrants as provided by Section 2957, which I quote as follows:

"Section 2957. Receipts and undelivered pension warrants returned to auditor.—The judge of probate shall deliver such warrant to the payees, having them to sign the receipt therefor which receipts the probate judge shall retain for not more than thirty days and together with all undelivered pension warrants shall at the expiration of such time return at once to the auditor's office, stating on said warrants the date of return, the reason for such non-delivery, and if dead the date of death and if removed from the state, the date of such removal, and such so returned shall be endorsed by the auditor 'Cancelled' on the face thereof with the dates and reasons for such cancellation and no other warrants shall be issued in the place of such cancelled warrants except it be shown by satisfactory proof that such cancellation was erroneously done."

The aforementioned section imposes upon the County Department of Public Welfare the duty to deliver these pension warrants and to obtain a receipt therefor.

Section 2959 of the Code of Alabama, 1923, reads as follows:

"Section 2959. Delivery in case of physical disability.—In the event the pensioner shall be physically unable to appear before the probate judge in person in order that he or she may receive the warrants, delivery may be made through a reliable citizen of the county in which the pensioner resides on the written request of said pensioner and on the affidavit of such citizen that the pensioner is at the time of such delivery of warrant actually living in the county and is physically unable to appear in person before such probate judge. At the time of such delivery the probate judge shall furnish the person through whom the warrant is delivered a blank receipt to be signed by the pensioner which receipt shall show the post-office address of the pensioner and where and with whom residing, and such receipt shall be returned to the probate judge who shall return the same to the auditor with other receipts, and the probate judge shall be responsible and liable on his official bond to the State of Alabama for the failure or wrongful delivery of said warrant. Each warrant before being paid must bear the endorsement of the payee attested by some witness in writing and where payee is unable to write such endorsement shall be attested by two witnesses in writing."

Section 2961, Code of Alabama, 1923, reads as follows:

"Section 2961. Pensioner moving from state dropped from roll; how reinstated.—Any soldier, sailor, or widow who shall become a resident citizen of another state shall be dropped from the pension roll of this state and the probate judge is expressly prohibited from delivering to any payee the pension warrant who is at the time of such delivery residing outside the state, and has no fixed abode within the state, and in case of absence from any cause for a period of twelve months the name of the pensioner shall be stricken from the pension roll. On the return of such pensioner to the state, where affidavit is made that such return is permanent, the name of such pensioner shall be restored to the pension roll without further proof, but in all cases where pensioners shall have been absent from the state for more than twelve months, they shall comply with all requirements of this article as to residence as are required of pensioners making original application to be placed on the pension rolls, and no pensioners shall be entitled to any quarterly allowance during the time so stricken from the roll."

If the pensioner is physically unable to appear before the Probate Judge in person, in order to receive his warrant, delivery may be made through a reliable citizen of the county on written request of the pensioner and on affidavit of such citizen that the pensioner is actually living in the county and is physically unable to appear. This section deals only with cases where the pensioner is actually residing in the county and does not deal with the situation wherein the pensioner is temporarily out of the State.

Section 2961, *supra*, provides that any pensioner who has become a **resident citizen** of another State shall be stricken from the pension roll of this State and it expressly prohibits the probate judge from delivering such pension warrant. It further provides that in case of absence from the State for a period of twelve months **from any cause**, that the pensioner shall be stricken from the pension roll. Nothing is said in this section that prohi-

bits the probate judge from delivering a pension warrant to a pensioner who is temporarily out of the State. Only two cases are contemplated by this statute, namely: (1) those pensioners who have become residents of another State and, (2) those who have been out of the State for twelve months or longer from any cause. There is no mandate in this statute that a pensioner who is temporarily out of the State shall be stricken from the pension roll.

It was not, in my judgment, the intention of the legislature to deprive a pensioner, who is temporarily out of the State, of his pension. It is the duty of the probate judge to obtain a receipt for such pension, no matter where the pensioner is, but if the pensioner is in the county, it is the duty of the probate judge to follow the terms of Section 2959, Code of Alabama, 1923.

Since Section 2957, *supra*, requires the probate judge to obtain a receipt for the pension, I think that he may lawfully do so by sending the pension warrant to the pensioner, who is out of the State through the United States mails. The letter or envelope enclosing the pension warrant must be addressed to the pensioner at his correct address, the postage prepaid, registered, return receipt demanded, and delivery thereof restricted by endorsement on the envelope with the following words: "For delivery only to person to whom addressed." Such restriction will under the postal rules insure delivery thereof only to the pensioner. The return receipt which is signed by the pensioner will be sufficient receipt as required by Section 2957, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 12, 1937.

Hon. D. E. Dunn,
Assistant Administrator,
Alabama Alcoholic Beverage
Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

Possession of alcoholic beverages on military reservation located in a dry county in Alabama for sale and distribution thereon—No alcoholic beverages may be possessed legally for sale or distribution at Ft. McClellen, a military reservation, located in a dry county in the State of Alabama, since no alcoholic beverages may be possessed for sale or distribution or sold or distributed in a dry county in Alabama, and the importation of alcoholic beverages into any state, territory, or possession of the United States for delivery or use therein, in violation of the laws thereof, is prohibited by Section 2 of the 21st Amendment to the Constitution of the United States.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 30, 1937, which follows:

"The question has arisen regarding the sale of alcoholic beverages at Fort McClellan, a government military reservation, located in Calhoun County.

"Since this camp is located in a dry county we would like to have an opinion on the following questions:

"1. What alcoholic beverages can be possessed for the purpose of sale or distribution on the reservation?

"2. If alcoholic beverages can be received for re-sale on the reservation, has the Alabama Alcoholic Beverage Control Board any control or jurisdiction over such sales?

"3. May officials of the reservation import liquor that does not bear the mark of identification that shows said liquor was purchased through the State Stores?

"4. Are malt and brewed beverages received for the purpose of sale and distribution on the reservation subject to the tax as provided for by the Alabama Beverage Control Act?"

This office in an opinion to Hon. William O. Baldwin, Chairman, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, under date of May 27, 1937, held:

"Inasmuch as importation of intoxicating liquors into Alabama is in violation of its laws, consignment of such intoxicating liquors originating without the boundaries of the State shipped to a consignee at Maxwell Field military reservation, is subject to the provisions of Alabama law, notwithstanding it is in interstate commerce. (Sections 19(3) and 24(9) Alabama Beverage Control Act; XXI Amendment of the Constitution of the United States)."

This holding was based on the provisions of Section 2 of the 21st Amendment to the Constitution of the United States, which provides:

"The transportation or importation into any State, Territory, or possession of the United States, for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

and the interpretation given to this part of the cardinal law of our land by the Supreme Court of the United States in the recently decided case of the **State Board of Equalization v. Young's Market Co. et al.** 81 L. Ed. 37. I quote the excerpt from that opinion, which was quoted in the opinion of this office to Mr. Baldwin, *supra*:

"The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let be imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

"Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee? Compare *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 447, 42 L. ed. 1100, 1104, 18 S. Ct. 674. There is no basis for holding that it may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domestic manufacture of beer and exclude all made without the State, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee? Moreover, in the light of history, we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic. Compare *Phillips v. Mobile*, 208 U. S. 472, 479, 58 L. ed. 578, 581."

The opinion of the office concludes as follows:

"It is sufficient to say that the XXI Amendment to the Constitution of the United States forbids any importation or transportation of intoxicating liquors into Alabama in violation of its laws. Being a part of the cardinal law of the land, the amendment is as effective upon military reservations belonging to the United States as it is in any other place."

On the basis of the holding of the opinion to Mr. Baldwin, *supra*, and the constitutional provisions and the United States Supreme Court decision therein cited and quoted from, it is my opinion that your questions should be answered as follows:

1. No alcoholic beverages can be possessed legally for the purpose of sale or distribution at Fort McClellan, a government military reservation located in Calhoun County, which is a dry county. The possession for sale or distribution of alcoholic beverages in a dry county in Alabama is in violation of the laws of the State of Alabama. See opinion of the Attorney General to Hon. E. Dick Burrows, Sheriff, Walker County, Jasper, Alabama, under date of April 3, 1937, and the provisions of the Alabama Beverage Control Act therein cited and quoted from. Since, as held in the opinion to Mr. Baldwin, *supra*, the importation of alcoholic beverages into a military reservation located in the State of Alabama, for use therein in violation of the laws thereof, is prohibited, it necessarily follows that no alcoholic beverages may be possessed legally for the purpose of sale or distribution on this reservation, which is located in a dry county in Alabama.

2. The answer given hereinabove to your first question obviates the necessity of an answer to your second question.

3. Your third question is answered by the opinion of this office to Hon. William O. Baldwin, *supra*.

4. The necessity of any answer to your fourth question is likewise obviated by the answer to your first question.

Yours very truly,

A. A. CARMICHAEL.

Attorney General.

August 12, 1937.

Hon. John Ben Darden,
Tax Assessor,
Chambers County,
LaFayette, Alabama.

Taxation—Homestead—Act No. 107, Special Session, 1936-1937.
Renting of a portion of a homestead to tenant does not deprive
the rented portion of its character as a homestead.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I quote from your inquiry as follows:

"Mrs. Roberts owns 149 acres of land and all of it joins. Her land is assessed at \$500, her Home House and 2 tenant houses are assessed at \$700, she owns all the work stock and lives in her home. Her Grandson lives with her and works her stock, he pays her standing rent for the land and stock. Would she be entitled to the Homestead Exemption?"

It is my opinion that the renting of a portion of the farm land occupied and used as a homestead does not deprive the rented portion of its character as a homestead. Mrs. Roberts would be entitled to claim the whole tract as exempt. This opinion is based upon the statement you make as to acreage, value and occupancy.

I refer you to an opinion of the Supreme Court of Alabama, **Bailey v. Dunlap Mercantile Company**, 35 So. 451, 138 Ala. 415, from which the following quotation is taken:

"The owner of a homestead may, if he chooses, rent out a portion of the tract without subjecting the portion so rented to the payment of his debts."

The aforequoted principle was again enunciated in the case of **Clark, et al., v. Byrd**, 48 So. 359, 158 Ala. 278, wherein the case of **Metcalf v. Smith**, 106 Ala. 301, 17 So. 357, is cited.

Homestead exemptions from payment of State taxes are defined by Section 1, Act No. 107, *supra*, as follows:

"The word 'homestead' as herein used is the 'homestead' as now defined by the Constitution and laws of Alabama."

It is permissible under the laws of Alabama for a portion of the homestead, used for farming purposes, to be rented without loss of character and identity as a homestead.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 12, 1937.

Hon. Charles E. Bragg,
Judge of Probate,
Lawrence County,
Moulton, Alabama.

Gasoline Tax—Lawrence County held to have authority to issue interest-bearing warrants payable out of the unpledged portion of the gasoline tax to be received by it from the State of Alabama (25% of the gasoline tax received by it from the State being pledged for the payment of indebtedness incurred prior to October 1, 1936, under Act No. 336, approved September 6, 1935, Local Acts 1935, page 204) for the payment of indebtedness incurred by it in the construction of roads, which said indebtedness was incurred since Feb. 1, 1937.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of August 5, 1937, which follows:

"On or about the 23rd day of September, 1936, Lawrence County by its Court of County Commissioners entered upon a contract with the State of Alabama whereby that section of Alabama Road No. 24 from Moulton, Alabama to the Franklin County Line would be improved and given a bituminous surface treatment, the expense of the job on the first six miles of said road to be borne by Lawrence county and the remaining, approximately eight miles, to be borne by the State, the plan of said operation under said contract being what is commonly known as a two-way project. However, the work on this project was not begun until on or about February 1, 1937, and no indebtedness was incurred for said work prior to that time. The work has been in progress and pay rolls have accumulated since that time, both in favor of individuals and the State, and in order to meet these obligations and to carry the project through to completion within the time and by the method consistent with economy, it is necessary that the county borrow \$20,000.00 and pledge its unpledged portion of the gasoline tax to the amount of \$2,000 per month for the next ten months (25% of this county's part of the gas tax is pledged for former indebtedness under local law 1935 Local Acts p. 204, being bill No. 336).

"In view of the local law, Byars bill No. 341, 1935 Acts, page 215, has the Court of County Commissioners of Lawrence County, Alabama, the authority to borrow \$20,000.00 and issue ten interest bearing warrants, in the principal sum of \$2,000.00 each, one warrant to mature on the 15th day of each successive month, payable out of the county's part of the gasoline tax, when received from the State, not otherwise pledged, the ten warrants to be fully paid in approximately ten months from date; in other words, has the county the authority to pledge a portion of its anticipated gasoline tax (to be received from the State) and issue its interest bearing warrants therefor, for a loan to be applied exclusively to the construction of said road under said contract.

"There will remain a sufficient portion, unpledged, of the gas tax to reasonably maintain the roads of the county for the next ten months."

This office, in an opinion addressed to Hon. Charles S. McDowell, County Attorney, Barbour County, Eufaula, Alabama, under date of Nov. 7, 1933, Biennial Report of Attorney General, 1932-34, page 407, held that a county

may pledge revenue anticipated by it from the state gasoline tax, and overruled all previous opinions of this office to the contrary. Since that opinion has been released, numerous subsequent opinions, all to the same effect and none in conflict, have been released by this office. Of course, the law levying and appropriating a part of the state gasoline tax to the various counties of the State has been reenacted with slight amendments since that time, the present act levying and appropriating this tax to the several counties being the 1935 Revenue Act. Likewise, there have been other enactments of the legislature pertaining to the gasoline tax since the date of that opinion. However, none of these acts have had the effect of depriving the counties of their right and authority to pledge the revenue anticipated by them from such tax for the payment of indebtedness incurred by them in the construction and/or maintenance of roads and bridges, which they were held to have by the opinion to Mr. McDowell, *supra*. That counties still have this right and authority to so pledge the revenue anticipated by them from this tax has been so held by this office in an opinion to Hon. N. P. Tompkins, Judge of Probate, Colbert County, Tuscumbia, Alabama, under date of Oct. 7, 1936, Quarterly Report of the Attorney General, Vol. 5, page 32.

The Supreme Court of Alabama in *re* Opinion of the Justices, 163 Southern 105, held that the fact that the indebtedness for which a county desired to pledge revenue to be received by it from the state gasoline tax, when added to the other general indebtedness of the county would exceed the constitutional debt limit, did not prevent a county from so pledging the revenue to be received by it from this tax. Of course, that decision was dealing with a particular special act of the Legislature applying to certain counties only, of which Lawrence County is not one, but what was there said by the Court so far as the constitutional debt limit of a county is concerned is equally applicable to all counties of the State. I quote the pertinent part of that decision:

"First: In our opinion the warrants or other securities authorized by the bill do not constitute nor evidence debts of the county within the meaning of Section 224, Constitution of Alabama.

"They are expressly declared not to be a charge on the general credit of the county but payable solely from the funds allocated and pledged under the act. The fund thus pledged is part of the proceeds of a state excise tax, levied and collected by the state, and allocated by statute to the several counties for the construction and maintenance of roads and bridges. *Jefferson County v. Hard*, Comptroller, et al, 227 Ala. 201, 149 So. 81.

"These obligations are not a charge on the general revenues of the county, nor on the proceeds of any levy by the county for special county purposes under the Constitution.

"Our recent decisions construing section 225, a related section fixing debt limits of cities, are applicable in principle to section 224. *Oppenheim v. City of Florence*, 229 Ala. 50, 155 So. 859; *Smith v. Town of Guin et al.*, 229 Ala. 61, 155 So. 865."

Therefore, so far as the general law of this State is concerned, your county has the authority to pledge revenue to be received by it from the state gasoline tax for the payment of indebtedness incurred by it in the construction of roads, and it would make no difference if this indebtedness for which you desire to pledge a portion of the revenue to be received by you from this tax when added to the other indebtedness of your county would cause the total indebtedness of the county to exceed the constitutional debt limit.

However, there are certain local acts pertaining to your county which must be considered and dealt with before we can arrive at a correct answer to the question propounded in your letter of inquiry. The first of these acts is Act No. 336, approved Sept. 6, 1935, Local Acts, 1935, page 104. That act provided that beginning October 1, 1936, 25% of the proceeds of the revenue received by Lawrence County from the state gasoline tax should be set aside for the payment of all indebtedness incurred prior to that time by Lawrence County for the construction and/or maintenance of roads and/or bridges. See Opinions of the Attorney General, addressed to you under date of September 26, 1936, found in Vol. 4, Quarterly Report of the Attorney General, on pages 191 and 196. You state in your letter of inquiry that the contract entered into by your county with the State of Alabama for the construction of the road for which the indebtedness which you now desire to finance was incurred, was entered into on the 23rd day of September, 1936. If this indebtedness had been incurred as of that date, that is, September 23, 1936, the day on which the contract was made, then it would be part of the indebtedness incurred by the county in the construction and/or maintenance of roads and/or bridges prior to October 1, 1936, and would, therefore, have to be paid for out of the proceeds of the 25% of the revenue received by your county from the state gasoline tax required to be set aside for that purpose by Act No. 336, supra, and you could not issue interest-bearing warrants payable out of the remaining unpledged portion of the revenue to be received by you from this tax for the payment of this indebtedness. However, you state that the work on this project was not begun until on or about February 1, 1937, and that no indebtedness was incurred for such work prior to that date. I am persuaded that this indebtedness which you are now seeking to finance in the manner outlined in your letter of inquiry was incurred subsequent to February 1, 1937, the date on which the work on this project began and not on September 23, 1936, the date on which the contract for this work was made. This for the reason that if for some reason the work had never been begun on this project pursuant to the terms of the contract, then the county would have incurred no indebtedness whatever. Therefore, it is my opinion that Act No. 336, supra, does not affect the matter here under consideration except that, of course, instead of the warrants which you desire to issue being payable out of the entire proceeds of the revenue to be received by your county from the state gasoline tax, they would be payable only out of the unpledged 75% of the said proceeds, 25% of the same having been pledged for the purpose hereinabove set out by the said Act No. 336.

The other local act with which we are now concerned is Act No. 361, approved September 7, 1935, Local Acts, 1935, page 215, which pertains to your county. This act provides as follows:

"Section 1. Beginning with October 1, 1935, the power and authority of the Board of Revenue of Lawrence County, Alabama, to incur and to pay claims or other obligations of the County, shall be and is hereby expressly limited to the actual income each fiscal year available for current operating purposes. All parties dealing with Lawrence County after this act becomes effective are hereby charged with the knowledge of the limitation the act imposes. Any services rendered the said Lawrence County, Alabama, and any materials, goods or supplies sold the said County in excess of the ability of the County to pay out of the unpledged income for the fiscal year in which the service is rendered or materials, goods and supplies furnished shall not be an obligation of the County and shall not be paid by the County. It being the purpose and intention of this act to provide that each fiscal year shall constitute an operating period, and that the said Lawrence County, Alabama, shall operate for such period on available, unpledged income for such said period and that

no operating obligation can be carried forward to be paid for out of the income of any succeeding year.

"Section 2. No warrant or order for money shall be issued in pursuance of authority of the Board of Revenue, or other like governing body, until the cash is available for its payment.

"Section 3. The Board of Revenue of Lawrence County shall make a complete record in detail of the financial status of the County, keep such record in a suitable book and available to the public at all reasonable times for inspection and examination. This record shall be kept up-to-date according to approved bookkeeping methods, easily understood. It shall at all times reflect the true financial condition of the County.

"Section 4. The Board of Revenue of Lawrence County, Alabama, shall as soon as practicable after October 1, 1935, refund all outstanding warrants unpaid at the time this act goes into effect and for which no money is available at that time. The refunding warrants shall not be sold below par, nor at a greater interest rate than six (6) per cent, nor may they be issued for greater amounts than was represented by the old warrants. They shall be made to mature at such maturity dates as will correspond with the estimated amounts represented by the sinking fund from the gas or other motor fuel taxes provided for by law and/or such other funds as may now be or may hereafter be provided.

"Section 5. The Board of Revenue is hereby empowered and authorized to pledge the general fund for the payment of new warrants in an amount not greater than the total represented by the old debts, and to pledge special funds in the same proportion that the original warrants issued or debts outstanding against special funds bears to the entire indebtedness.

"Section 6. All laws and parts of laws in conflict with the provisions of this act are hereby expressly repealed.

"Section 7. Should any section or clause of this act be held unconstitutional or invalid, same shall not invalidate any other section or clause of this act which is not in itself invalid.

"Section 8. This act shall become operative October 1, 1935."

It is Section 1 of this act which requires the county to operate each fiscal year within its income for that year. Section 2 provides that no warrant shall be issued until the cash is available for its payment. Therefore, if these two sections of this act are applicable to the gasoline tax fund, then you would be prevented by their provisions from issuing interest-bearing warrants to be paid out of the unpledged 75% of the proceeds of the revenue to be received by your county from the state gasoline tax by which to finance this indebtedness. However, I am persuaded that these two sections, requiring the county to live within its income and prohibiting the issuance of a warrant until cash is available for its payment, apply only to the general fund of the county and not to the gasoline tax fund. It will be noted that Section 1 makes repeated references to the county but nowhere does it mention any special funds of the county. In the absence of any reference to special funds, it is my opinion that the references in this act to "payment by the county" and "obligations of the county" etc., refer to and are applicable to the general fund of your county only and not to the gasoline tax fund. As authority for this holding, see *Weaver v. Tidwell*, 228 Ala. 169, wherein Mr. Chief Justice Anderson for the Supreme Court of Alabama, held that a reference to a payment out of the "county treasury" meant out of the general

fund of the county. See also the opinion of this office to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, Quarterly Report of the Attorney General, Vol. 5, page 38, under date of October 7, 1936, holding that the budgeting provisions of Act No. 397, General Acts, 1935, page 803, popularly known as the County Financial Control Act, applies only to the general fund and that the gasoline tax fund is not included therein. You will recall that this is a general act passed at the same session of the Legislature at which the local acts here under discussion, which apply only to your county, were passed. It was the purpose of that act to require all counties to which it was applicable to operate on a budget basis and to live within their income. It would have applied to your county except for the fact that these local laws here under consideration are effective in your county. However, these local laws govern in your county where they conflict with this act, as was pointed out to you in the opinions previously rendered you on these acts. Since the provisions of sections 1 and 2 of Act No. 361, supra, apply only to the general fund and not to the gasoline tax fund, there is nothing in this said act which would prevent your county from funding the indebtedness referred to in your letter of inquiry, in the manner outlined by you therein.

These are the only two local acts concerning the matter dealt with in your letter of inquiry. Since, as has been held hereinabove, Act No. 336 does not apply because of the time element involved, and the provisions of Act No. 361 requiring the county to live within its income and prohibiting the issuance of a warrant until the cash is available for its payment do not apply for the reason that these provisions of this act are applicable only to the general fund and not to the gasoline fund of your county, then neither of these acts prevents you from pledging revenue to be received by your county from the state gasoline tax for the payment of indebtedness incurred by it in the construction of roads, as you have the right and authority to do under general law.

The premises considered, it is my opinion that your county governing body has the right and authority to issue interest-bearing warrants payable out of the unpledged 75% of the revenue to be received by it from the state gasoline tax, with which to secure the necessary funds to pay the indebtedness which it has incurred since February 1, 1937, in the construction of roads in your county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General

August 12, 1937.

Hon. J. Russell Gibson,
Tax Assessor,
Pike County,
Troy, Alabama.

Taxation—Homestead Exemption—Act No. 107, Special Session,
1936-1937.

Farm cultivated by owner (single man) who does not live there—
but boards, is not a homestead.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date, which I quote as follows:

"A single man, without family, owns a farm of 108 acres, the owner boards at a neighboring farm but lives on it from morning to night.

"This farm is all the property possessed by the above owner and is his sole source of income.

"Can the above owner legally claim exemption as provided by the recent Homestead Act."

It is my opinion that the question you present should be answered in the negative for the reason that the owner does not occupy the property as contemplated by law and required in order for the property to constitute a homestead.—*Hodges v. Hodges*, 77 So. 741, 201, Ala. 215; *Beaty v. Washam*, 87 So. 337, 205 Ala. 92; *McConaughy v. Baxter*, 55 Ala. 379; *David's Adm's v. David*, 56 Ala. 49; *Preiss v. Campbell*, 59 Ala. 635; *Waugh v. Montgomery*, 67 Ala. 573.

This opinion is to be distinguished from the opinion of this office to Hon. T. D. Woodham, Tax Assessor, Ozark, Alabama, dated Aug. 10, 1937, (Syllabi (b) and (c)) which deals with property in which the claimant had a leaseholder's interest as well as fee simple title. The law permits a claimant to tack on property which he owns, to property in which he has only a leaseholder's interest and upon which he actually resides, and claim both parcels, under certain conditions, exempt as a homestead. Justice Clopton, in the case of *Tyler v. Jewett*, 82 Ala. p. 93, speaking for the court said as follows:

"It was not contemplated, nor intended, by the term 'owned', as employed in the constitution that absolute ownership, or an estate in fee, should be essential to a valid exemption of real property from the payment of debts. There is no limitation to any particular estate, either as to duration, quantity, or extent. It is the land on which the dwelling-place of the family is located, used, and occupied as a home, which the constitution and statutes protect, however inferior may be the title, or limited the estate or interest; not because there is an estate or interest in the land, but because it is the homestead, the dwelling-place, and its appurtenances. * * *

"It is insisted, however, that complainant could not impress the character of a homestead upon the lot in question, until he abandoned the leased house and lot. It does not necessarily follow that complainant should actually have a dwelling on the lot purchased, in which his family resided, in order to include it in his homestead, and as part thereof.

" * * * There are cases, and the present case seems to be one, where the head of a family, for want of means, is unable to purchase a lot, and, at the same time, construct thereon necessary buildings, but who has means sufficient to procure the ground, and wait further preparation, until by energy, industry, and economy, he is able to erect a dwelling and other houses. In such case, we see no sufficient reason why in the meantime he may not lease adjoining premises having a dwelling-place, where he may reside, and, by appropriate and requisite occupation and uses of the land purchased as appurtenant thereto, impress the essential characteristics, and constitute it a part of his homestead, in the same manner and to the same extent as if he had acquired both lots by purchase, so far as respects its alienation or subjection to the payment of debts. The preservation of such part of the homestead so created and constituted is within the purview of the constitution and

statutes, and in furtherance of their purposes and policy. On the facts shown by the record, the lot in controversy was a part of the homestead of complainant when the mortgage was executed, which the constitution and the statutes protect."

It is to be observed that the claimant must own some possessory interest in the property which he claims exempt as a homestead. If he owns no possessory interest, by lease or otherwise, in the property to which he seeks to tack on other property and claim both parcels as a homestead, then the law would not countenance a homestead claim. The claimant, who seeks a homestead exemption as mentioned in your letter, has no possessory interest in the property where he is housed as a boarder. A boarder acquires and pays for service and a license or privilege rather than a possessory interest in the real estate.

It is my further opinion that the claimant does not use the 108 acres as a shelter for his home as contemplated by law. The mere fact that he cultivates the property is not sufficient to constitute the real estate as a homestead.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 13, 1937

Hon. J. D. Henry, Chairman,
Board of Revenue,
Calhoun County,
Anniston, Alabama.

Prisons—Claim for operation authorized.—Hospital expenses authorized.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

I have your letter of May 20, 1937, in which you state:

"On May 8th, 1937, Charlie Carter was placed in the Calhoun County Jail on a warrant charging Grand Larceny of an automobile valued at \$200.00, the said warrant returnable to the Calhoun County Court. On May 9th, this man had an attack of appendicitis and it was found necessary to perform an immediate operation. He was removed to an Anniston hospital and the necessary operation was performed by a local physician, who is retained by the Board of Revenue as County Jail Physician at a salary of \$200.00 per year.

"There is no written contract between the Calhoun County Board of Revenue and the County Jail Physician. The agreement with the Board under which the jail physician is working does not include the type of service rendered by the physician in performing the operation.

"The Calhoun County Board of Revenue has now been presented with a claim by the physician for \$100.00 for services in performing the operation. The hospital has also filed claim for the necessary hospital expenses. The man is in indigent and unable to pay the expenses himself.

"Please advise if it is your opinion that the Board of Revenue can legally allow the claim as presented by the attending physician and the hospital."

In my opinion your first question should be answered in the affirmative. Section 2800, Code of Alabama, 1923, provides as follows:

"Section 2800. SICK PRISONERS IN JAIL.—Whenever any insolvent person, confined in jail in any county of the state, on any criminal charge, becomes sick or is injured and requires medical or surgical attention or medicine, the sheriff, or jailer, of the county must give notice to the probate judge of the county of the condition of such person, and the probate judge must, on receiving such notice, or on receiving such information in any other manner, of the sick and destitute condition of such person, employ a physician or surgeon, and furnish medicines and appliances as may by him be prescribed for such sick person; and the reasonable expenses of such medical attendance and medicines shall constitute a valid claim against the county."

I am of the opinion your second inquiry should be answered in the affirmative.—Section 4808, Code of Alabama, 1923; Quarterly Report of Attorney General, Vol. III, p. 189; Biennial Report Attorney General, 1930-1932, p. 3.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 13, 1937

Hon. C. H. Hamilton,
Probation Officer,
Juvenile and Domestic Relations Court,
Birmingham, Alabama.

Section 5, Acts 1935, page 983. Automobile used exclusively by deputy sheriff in performance of duties as probation officer of Juvenile and Domestic Relations Court not required to be painted yellow.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 9, in which you request my opinion as follows:

"Under Section (5) Five of this Act quote;

"The governing body of each such County is hereby charged with the duty of causing the outward surface of each passenger automobile owned or controlled by such County, except those devoted **exclusively to the use of the Sheriff or his deputies**, to be maintained, at all times while so owned or controlled, a bright yellow color, etc."

"I am assigned and carried on the pay roll of Jefferson County as a Probation Officer of the Juvenile and Domestic Relations Court. I am a regularly commissioned deputy sheriff and my duties are the same, that is, serving criminal warrants, subpoenas, etc. issued by said Court.

"I have been assigned an automobile painted a bright yellow color, and it is used exclusively in performing my duties as such probation officer or deputy sheriff. It is and has been my experience that by reason of the distinctive color of the car, I have been unable to apprehend criminals, viz: A Mr. Webb was charged with Contributing to the delinquency of a Minor Child, on three separate occasions I tried to serve him or arrest him with duly executed warrant, but he was aware of the approach of my yellow automobile and ran out of the house into a wooded area, so that I could not find him, eventually he left the State of Alabama and has not as yet been apprehended. Other cases too numerous to mention in detail of like nature has been my experience.

"Please advise me as to whether or not in your opinion I should or not be assigned a yellow car.

"This car I am now driving needs a new coat of paint, so will appreciate an early reply."

In my opinion, the act referred to does not require that the automobile furnished to you by the county should be painted yellow. Section 5 of the act referred to (Acts 1935, page 983) expressly excepts from the automobiles required to be painted a bright yellow color, those automobiles "devoted exclusively to the use of the sheriff or his deputies".

From the facts set out in your letter, the automobile in question is devoted exclusively to the use of you as a deputy sheriff of Jefferson County. All of the reasons for this exception from the general requirement that all automobiles of the county be painted yellow apply with equal force to the automobile used by you in the performance of your duties as deputy sheriff.

It is my opinion, therefore, that the governing body of Jefferson County is not required by said act to paint the automobile furnished to you a bright yellow color. There is nothing in the act which would prevent said governing body from furnishing you an automobile of yellow or any other color that they desire.

Yours very truly,

A. A. CARMICHAEL,

Attorney General

August 13, 1937

Hon. J. W. Rutland,
Tax Assessor,
Colbert County,
Tuscumbia, Alabama.

Taxation—Homesteads—Act 107—General Acts, 1936-37, p. 113—
Rural and City property discussed.

1. Property actually occupied and cultivated by owner of land claimed as homestead is, within lawful area and assessed value, exempt from State taxes.

2. Owner may not select homestead out of land which he does not occupy and claim it as exempt from State taxes.

3. Rural property owned and cultivated by single person who lives in city, town or village is not exempt, as a homestead, from State taxes.

4. Rural property owned and cultivated by person who occupies rented house in city, town or village, is not exempt, as homestead, from State taxes.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your recent inquiry as follows:

"(1) B. I. Rutland wishes to claim homestead exemption on his farm of 160 acres, being the N $\frac{1}{2}$ of N $\frac{1}{2}$ of Section 23, Township 4, Range 13, which is farmed by himself with day labor. He eats and sleeps on the 80 acre homestead in Section 24, Township 4, Range 13 with his wife's aged mother.

"Would the case of temporary absence entitle Mr. Rutland to file said claim?

"(2) William K. Guthrie, a single man, owns land in West end of this County which he farms with day labor, however, he actually lives in Tuscumbia.

"Would he be entitled to homestead claim?

"(3) Mr. A. D. Sherrill, Tax Collector of this County and myself own lands in West end of County, but rent homes in Tuscumbia, and vote in Tuscumbia. We also operate our farm with labor and share croppers. Could we qualify for homestead exemption?"

It is my opinion that your first question should be answered in the negative. It appears from your statement of facts that the claimant does not live on any portion of the 160 acres which he desires to claim as exempt from payment of State taxes, but lives upon another tract.

Act No. 107, General Acts of 1936-37, p. 113, which authorizes exemption of homesteads from the payment of State taxes, defines a homestead as that which is defined by the Constitution and laws of Alabama.

The laws of Alabama require actual occupancy of property as a necessary incident to a homestead. The Courts have construed actual occupancy as existing when disconnected tracts are farmed in connection with each other and for the common support of the family. **Dicus v. Hall**, 3 So. 239, 83 Ala. 159. See opinion of this office to Hon. T. D. Woodham, Tax Assessor, Dale County, Ozark, Alabama dated the 10th day of August, 1937. Actual occupancy, except in cases of temporary absence, is essential to constitution and retention of homestead in Alabama. **Hodges v. Hodges**, 77 So. 741, 201 Ala. 215.

The Courts of Alabama have also held that a tract of land actually owned by claimant may be tacked on to property which he has leased, and both tracts, if within lawful area and value, and if cultivated in common for family support, may be claimed as a homestead. **Bailey v. Dunlap Mercantile Company**, 35 So. 451, 138 Ala. 415.

The statement of facts presented in the first paragraph of your letter does not disclose any actual occupancy by Mr. Rutland on the 160 acres of land which he desires to claim exempt as a homestead. There is no

actual residence thereon as contemplated by law. The house in which he actually resides upon an 80 acre tract is no part of the 160 acres. This 80 acre tract would have to be included as a part of any homestead claim which Mr. Rutland would be lawfully authorized to file.*There is no authority of law for a claimant to select his homestead exclusively out of property upon which he does not reside.

With reference to your question presented in paragraph of your letter marked (2). It is my opinion Mr. Guthrie would not be entitled to claim a homestead in the lands which he owns in the West end of the County. A different rule seems to prevail as to city, town, or village property and as to rural property.

The Constitution of Alabama, as interpreted by the Court in the case of *Seabury et al v. Hemley*, 174 Ala. 116, makes the distinction. Justice Anderson speaking for the Court said as follows:

"The proof shows that the mortgagor Frismuth resided upon a tract of land owned by him within the village of Whistler, and the land in question was disconnected therefrom and was located without the bounds of said town or village. It was not, therefore, a part of the homestead under the Constitution of 1868. *Garner v. Bond*, 61 Ala. 84. It is also questionable whether or not it would be under the present Constitution, for our court in the case of *Tyler v. Jewett*, 82 Ala. 93, 2 So. 905, in dealing with the homestead in a city, said through Clopton, J.: 'We have, therefore, as postulates, that the right to homestead exemptions does not depend on the nature of the title, or the degree or character of the estate, but will be determined by occupancy and uses, and that a homestead may consist of two or more adjoining pieces of lands, so connected, occupied, and used as to constitute, in contemplation of law, one tract.' A different rule seems to prevail as to the homestead not within a city, town, or village— *Dicus v. Hall*, 83 Ala. 159, 3 So. 239. While the homestead provision has been liberally construed, so as to avoid the unmixed evil and misfortune of a homeless population, the Constitution cannot be so construed as to combine property within and also beyond the limits of a city, town or village, so as to stamp the two together as one homestead. There is a marked distinction between a homestead in the county and one within a city, town or village.—*Dicus v. Hall*, supra."

An examination of the Constitutions of 1868 and of 1901, reveals almost identical homestead provisions so far as city and real property are concerned. The interpretation by the Court of the constitutional provision of 1868, allowing homestead exemptions, has application to the present provision of the Constitution of 1901 granting homestead exemptions for the reason that the two provisions are substantially identical. Therefore, the rural property owned by Mr. Guthrie cannot be tacked on to the property which he occupies in Tusculumbia so as to permit Mr. Guthrie to claim rural property as a homestead and thus entitle him to an exemption from the payment of State taxes.

Referring to the Question presented in paragraph marked (3) of your letter, it is my opinion that, according to the foregoing rule, you would not be permitted to tack your rural property on to the property which you lease in town and claim it as exempt from payment of State taxes. However, there might be some facts not disclosed in your letter which would entitle you to claim some of your rural property exempt from payment of taxes.

If you left your rural homestead with the intention of returning at some future date, and have not rented it out under such circumstances as to establish the relation of landlord and tenant, other than a tenancy at will or at sufferance, and if at the time you left you intended to return, and such intention has continued until this time, you would be lawfully authorized to claim the rural property which you actually occupied as a homestead as exempt from the payment of taxes. If you left with an intention to return, and such intention has continued, but you have rented the property under such circumstances as to constitute a relation of landlord and tenant, other than at will or sufferance, and you have failed to file in the probate office a declaration of your intention to return in accordance with Section 7883, Code of Alabama, 1923, you would not be entitled to claim such property as exempt from the payment of State taxes. **Smith Lumber Company v. Gary**, 80 So. 857, 202 Ala. 473; **Miles v. Miles**, 99 So. 187, 211 Ala. 26, **Hollis v. American Wholesale Corporation**, 120 So. 204 215 Ala. 644, **Trapp v. First National Bank**, 117 So. 197, 217 Ala. 587; **Shaddix v. Bilbro**, 127 So. 227, 220 Ala. 657.

In writing this opinion, in giving you a negative answer to your question (3), I am assuming that facts do not exist which constitute your absence from your homestead as temporary. If, as I have outlined above, your absence from your homestead is merely temporary, that is, at the time you left you had an intention to return and such intention continued, you did not rent out the property in such manner as the relation of landlord and tenant, other than at will or sufferance, was established, but you rented it in such manner that you could return at any time you desired, no exclusive possession being vested in the tenant, then you would be entitled to claim homestead exemptions, and my answer to your question should be withdrawn, and an affirmative answer given you. I direct your attention to Section 8807, Code of Alabama, 1923, which sets out facts that will constitute the relation of landlord and tenant.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 13, 1937.

Hon. N. P. Tompkins,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Section 201 of the Revenue Act of 1935—Taxation—Redemption—State, County and city tax sales by Judge of Probate.

1. Probate Court has jurisdiction to render decree of sale for municipal taxes where ordinance adopted pursuant to Section 201, Revenue Act of 1935.

2. Redemption of land sold for municipal taxes pursuant to Section 201, Revenue Act of 1935, made through the probate office in the same manner as redemption from sale for state and county taxes.

3(a) If land sold to the State for State and county taxes, Probate Judge cannot require payment of city taxes upon redemption from such sale.

(b) If sold to person other than the State for State and county taxes, Probate Judge can collect all taxes upon redemption.

4. If land sold for state, county and city taxes, the Probate Judge, as a condition to redemption of property sold for state and county taxes, is not required to demand redemption of the property from a sale for city taxes pursuant to Section 3095 of the Code of Alabama of 1923, now appearing as Section 201 of the Revenue Act of 1935, (General Acts 1935, page 256) prescribing machinery for assessment and collection of city taxes, such redemption being entirely separate and independent.

5. Probate Judge permitting redemption of property sold to city for city taxes, pursuant to Section 201, Revenue Act of 1935, required to collect money for which lands were sold for taxes, plus money due for subsequent year's taxes.

6. If property sold to purchaser other than city for city taxes, pursuant to Section 201, Revenue Act of 1935, Probate Judge permitting redemption from such sale required to collect the amount for which land sold with interest at six per cent, together with all taxes paid or assessed.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

Reference is made to your inquiry of recent date, which I quote as follows:

"Recently arrangement has been made by certain cities and towns in Colbert County for the County Tax Assessor to assess and the County Tax Collector to collect the municipal taxes of such cities and towns.

"Now since the Tax Assessor and Tax Collector of the County will assess and collect such taxes please advise me whether in the enforcement of the collection of such taxes the Probate Court would have jurisdiction to render a decree of sale for such municipal taxes.

"Please also advise me whether the redemption of real estate sold and municipal taxes will be made through the Probate Office and whether or not as Probate Judge I have any duties in connection with the sale or redemption of land which may be sold for municipal taxes.

"Please also kindly advise me whether I should require a tax payer who redeems through my office from a sale for state and county taxes to also pay the municipal taxes which may be due upon the property at the time the tax payer redeems.

"In other words I desire to know whether or not this new arrangement which has been made for the County Tax Assessor and Tax Collector to assess and collect the taxes of these cities and towns places upon me any duties in connection with the enforcement of the collection of such taxes the sale of such property for the payment of municipal taxes or the redemption of such property from a tax sale;" and also to your subsequent inquiry as follows:

"I desire to know what duties I have to perform with reference to the collection of city taxes where the property has been sold for State, County and City taxes and the owner seeks to redeem through my office.

"1. In the event there is a sale of real estate for State, County and City taxes and subsequently the owner applies to this office to redeem shall I require the payment through this office of the city taxes that accrued as well as the state and county taxes?

"2. If you rule that I should collect the city taxes through this office upon redemption please also advise me whether I should also collect all back taxes that have accrued in favor of the city as well as the city taxes for which the property sold.

"3. In the event real estate has sold for state and county taxes prior to the time that these ordinances were passed requiring the assessment and collection of city taxes by the County Tax Assessor and County Tax Collector, and the owner desires to redeem from such tax sale made for state and county taxes should I ascertain the amount of city taxes that have accrued and collect this before allowing redemption from the state and county tax sale?"

Under the provisions of Section 3095, Code of 1923, now appearing as Section 201, Revenue Act of Alabama of 1935 (Act No. 194, General Acts 1935, page 256), it is provided:

"Any municipal corporation in this state may, by ordinance duly adopted, provide for the assessment, equalization and collection of taxes due such municipality by the officers and boards provided in this chapter, and all the machinery herein provided for the assessment, equalization and collection of state and county taxes, the enforcement of such collection, the sale of property for the collection of taxes and the redemption from such sales, shall be applicable to the assessment and collection of such municipal taxes, the sale of property for the collection of such municipal taxes, and the redemption from such sales."

This statute was originally enacted into law as Section 239, Revenue Act of 1919, Acts of 1919, page 352. Immediately following said section in the Revenue Law of 1919, appeared the section providing for the sale of lands for taxes by the order of the Probate Court, which provisions have not materially been changed and appear in the Revenue Law of 1935, as amended by the Acts of the Extra Session of 1936 as Section 201 and Section 324, et seq. This Section 3095 of the Code of 1923 appears in Chapter 58 of the Code of 1923, "Taxation", and therefore all of the provisions of that Chapter 58 of the Code of 1923 apply to the assessment, collection and sale of the property for collection and the redemption from such sales for the municipal taxes. The duty of the Judge of Probate as to sale for such municipal taxes and the jurisdiction of such proceedings is therefore the same as to sale of lands for taxes due to the State. In my opinion, therefore, where the cities have adopted the proper ordinance pursuant to Code Section 3095, now appearing as Section 201 of the Revenue Law of 1935, you have the same jurisdiction and should follow the same procedure for the sale of lands for such municipal taxes as has been followed for the sale of lands for taxes due the State or county.

2. Your second question is whether the redemption of real estate sold for municipal taxes will be made through the Probate Office and whether or not as Probate Judge you have any duties in connection with the sale or redemption of land which may be sold for municipal taxes. Your

inquiry as to your duties in connection with the sale for municipal taxes has been answered above. Under the provisions of said Code Section 3095 and Section 201 of the Revenue Law of 1935, all provisions for redemption from tax sales applicable to State and county taxes apply to such sales for municipal taxes under said Act. Such redemption, therefore, must be made through the Probate Office in the same manner and you are subject to the same duties in regard to such redemption that you are in respect to the redemption of lands sold for State and County taxes.

3. Your next inquiry is whether you should require a taxpayer, who redeems through your office from a sale for State and County taxes, to pay the municipal taxes which may be due upon the property at the time the taxpayer redeems. Where such land has been sold to the State for State and County taxes, the provisions of Section 269 of the Revenue Law of 1935, as amended by the Act of the Extra Session of 1936, Chapter 30, governs such redemption and the amount which must be paid by the taxpayer. It is provided in said section that the Probate Judge must submit the application for redemption to the Tax Assessor of the county in which the land was located, who must enter an assessment value for each of the years for which taxes are due. Sub-section (c), as amended, provides:

"The redemptioner shall deposit with the Probate Judge the amount of money for which lands were sold for taxes plus the amount of money due for subsequent years based on the assessment value as required to be fixed in sub-section (b) of this section and interest, costs and fees, as provided in sub-section (a) of this section."

No provision is made in that section for the collection of municipal taxes, and, in my opinion, where such lands have been sold to the State, you have no authority to require a taxpayer redeeming from the sale for State and County taxes to pay taxes due the municipality. Any contrary conclusion would adversely affect the State in its rights to have the property redeemed and to secure its tax money promptly.

(b) If such property has been sold for State and county taxes to a purchaser other than the State, the amount to be paid on redemption is governed by Section 270 of the Revenue Act of 1935. It is there provided that the taxpayer redeeming should deposit in the office of the Judge of Probate the amount of money for which the land was sold, with interest thereon at the rate of six per cent per annum, from the date of sale:

"Together with the amount of **all taxes** which have been paid by the purchaser, which fact shall be ascertained by consulting the records of the Tax Collector, with interest on said payment at six per cent per annum. If any taxes on said land have been assessed to the purchaser and have not been paid, and if said taxes are due which may be ascertained by consulting the Tax Collector of the County, the Probate Judge shall also require the party desiring to redeem said land to pay the Tax Collector the taxes due on said lands, which have not been paid by the purchaser before he is entitled to redeem the same."

In my opinion, the words "all taxes" as used in said section would include municipal taxes where the city has adopted the ordinance required. It is, therefore, my opinion that if the property has been sold for State and County taxes to a purchaser other than the State, upon application for redemption you should require the deposit for the amount of money for which the lands were sold with interest thereon at the rate of six per cent per annum, together with all taxes both State, county and municipal

which have either been paid by the purchaser or assessed to the purchaser and have not been paid but are due.

4. Your next inquiry is: "In the event there is a sale of real estate for State, County and city taxes and subsequently the owner applies to this office to redeem, shall I require the payment through this office of the city taxes that have accrued as well as the State and county taxes?" This office has previously ruled that such sales for State and county taxes and such sales for municipal taxes must be separate sales. See also opinion to Hon. A. D. Sherrill, Tax Collector, Colbert County, Tuscumbia, Alabama, under date of July 2, 1937. If the redemption referred to is from a sale for State and county taxes, your inquiry as to city taxes has been answered above.

There is a further question included in your inquiry as to the right to require a redemption from city taxes at the time of such proposed redemption from state and county taxes. I refer you to Section 2129 of the Code of Alabama of 1923, which I quote as follows:

"Section 2129. Tax sale; title of.—Cities and towns shall have a lien for taxes upon all property assessed for taxation, which shall be superior to all other liens, except for taxes held by the state and county."

In view of the fact that the State and County lien for taxes is superior to the lien for municipal taxes on the same property, you have no authority under the laws of Alabama, except in special cases where there has been a specific act of the Legislature placing a lien for city taxes on a parity or equal basis with the lien for State and county taxes, to require redemption of the property from the sale for payment of the city taxes as a condition to redemption of the property from a sale for payment of State and county taxes. Otherwise you would be placing the lien for city taxes on an equal basis with the lien for State and county taxes in conflict with the provisions of Section 2129. Although the Act, *supra*, provides that the machinery of the State of Alabama may be used for the assessment and collection of city taxes, there was no expressed intention on the part of the Legislature to make redemption from State tax sales and from city tax sales dependent upon each other and to place the lien of city taxes on an equal basis with the lien for State taxes. The redemptions are several and distinct and in no way related. It is therefore my opinion that upon the redemption of property from a sale for the payment of State and county taxes, you are not required as a condition thereto to demand redemption of property from a sale for city taxes, pursuant to Section 3095 of the Code of Alabama of 1923, now appearing as Section 201 of the Revenue Act of Alabama, General Acts 1935, page 256.

Such redemptions from sales for city taxes and from sales for State and county taxes being separate and distinct, it is further my opinion that if redemption is sought to be made through your office from a sale for city taxes, you have no authority to require a redemption from a sale for State and County taxes.

5. In the event redemption is sought to be made from a sale for city taxes, the amounts to be collected by you are governed by the appropriate provisions of the laws governing redemption from sales for State and county taxes, since the effect of the adoption of ordinances pursuant to said Section 201 of the Revenue Act of 1935 is to provide the same machinery and requirements for redemption from city taxes as are provided by said Act for redemption from State and county taxes. If said property is purchased by the city at sale for city taxes, pursuant to said section, it is my opinion that you should collect the amounts provided by Section 269 of the Revenue

Law of 1935, that is the amounts required to be collected for sales of property to the State for State and county taxes. These amounts and this section are set out above.

6. If such property is sold for city taxes to a purchaser other than the city, it is my opinion that redemption from such sale is governed by the provisions of Section 270 of the Revenue Act of 1935, set out above, and upon such redemption you should require the deposit of the amount of money for which the land was sold with interest thereon at the rate of six per cent per annum, the amount of all taxes paid by the purchaser with interest at six per cent per annum and the amount of all taxes assessed to the purchaser and not paid but due. I believe this answers all the questions asked in your two inquiries.

This opinion has no application to Jefferson County; nor to cities within a population range of not less than 6500 or more than 15,000, governed by Act No. 300, General Acts of Alabama, 1931, page 337; nor to the City of Auburn, nor to any other city in the State which is governed by a strictly local or general law with local application contrary to the provisions of the statutes herein cited.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 14, 1937.

Dr. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

Counties—Alabama Sales Tax Act—Use of Money.

Money derived by counties from sale tax and used to defray expenses incurred for burial of paupers, for registration of births and deaths, maintaining a charity ward in a hospital, maintaining, a tubercular preventorium, and to pay salary of nurse used in rest room of county courthouse, must be used in cooperation with State Board of Health and/or Federal Government, or in cooperation with State Department of Public Welfare and/or Federal Government.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"I have before me copy of opinion rendered Hon. M. T. Maxwell, Secretary and Purchasing Agent of the Tuscaloosa County Board of Revenue, bearing on use of money derived from the sales tax.

"Can the things specifically dealt with in this opinion be done by counties without the cooperation of the State and Federal agencies concerned, as set forth in Section 21 of the Alabama Luxury Tax Act?"

You refer to an opinion of this office, dated July 2, 1937, to Mr. Maxwell, which held that the County is authorized to use proceeds derived from Alabama Sales Tax Act to defray expenses incurred for burial of paupers, for

registration of births and deaths, for maintaining a charity ward in a hospital, and for the maintenance of a tubercular preventorium, and to pay salary of nurse used in rest room of county courthouse.

There must be a factual identification of the work for which the money may be used as outlined in the opinion to Mr. Maxwell with an agency named and designated in Section 21 of the Alabama Sales Tax Act, and the money must be used in cooperation with that agency, otherwise the use thereof as designated in the opinion to Mr. Maxwell, would be contrary to Section 21, Alabama Sales Tax Act, the pertinent provisions of which section I quote as follows:

“* * * and one-half of said proceeds shall be divided or distributed equally among the sixty-seven counties; provided that the funds divided and distributed to the several counties of the State as hereinabove provided for shall be used exclusively for full-time health service in cooperation with the State Board of Health and/or the Federal Government; for public welfare in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension services in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State.”

You will observe that the aforequoted law requires that the money must be used in cooperation with an agency therein named. If the several purposes for which the money may be used as set forth in the opinion of this office to Mr. Maxwell are not as a matter of fact a part of the work done or carried on by these several agencies at the time of the proposed use of the money, then the specific requirement of Section 21 for cooperative use of the money could not be met. There must be cooperation on the part of these several agencies. The existence of cooperation is not a matter of determination for this office. The ramifications of the work done by the several agencies named in Section 21, *supra*, are capable of ascertainment, but such ascertainment is not pertinent to this opinion.

The opinion to Mr. Maxwell is extended by incorporation therein of the statement that the purposes for which the money may be used must be in cooperation with the proper agencies designated in Section 21, *supra*.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 14, 1937.

Honorable Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation—Homestead Exemption Refunds—Act 107, Special Session 1936-37.

Where total assessed value of homestead is less than maximum lawful exemptions, the State is not liable to claimant for any amount based on the difference.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter which I quote as follows:

"We have just received your ruling to Mr. Flowers, Tax Assessor of Montgomery County, in which you stated that a blind person is exempt both under the blind exemption and the State Homestead Exemption Act. We have the following example in our county in the case of B. T. Hortenstine, non composmentis, who resides at 1313 Fulton Ave., W. E., Birmingham, Alabama.

"Mr. Hortenstine owns real estate and personal property in Jefferson County which totals in assessed value \$2115.00. Exemption was allowed him under Section 2—sub-section F. in the amount of \$1200.00. This left a total assessed value of \$915.00 on which taxes were due. Taxes due the State on this amount is \$5.95. Homestead exemption is claimed, and the assessed value of his home is \$1200.00. This means a credit of \$7.80 whereas he only owes the State \$5.95 and would mean that the State owes claimant \$1.85.

"Inasmuch as we have many instances of this nature in our county, we are holding up issuing credit until we receive your ruling."

The legislature, whether wisely or unwisely, failed to make any provision for paying to the claimant any amount based on the difference between the assessed value of his property and the maximum exemptions allowed by law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 14, 1937.

Hon. W. B. Thrash,
Tax Assessor, Cleburne County,
Heflin, Alabama.

Taxation—Homestead Exemption in two counties—Act No. 107, General Acts, 1936-37.

1. Tracts of land in separate counties, cultivated in common and used as common source of revenue for the support of occupant's family, may both be claimed as exempt.

2. Where homestead is situated in two or more counties, tax assessor of each county should grant proportionate exemption from state taxes, the total not to exceed 160 acres in area and \$2,000 in assessed value.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter as follows:

"Where a person owns 40 acres of land in one county and 40 acres in another county adjacent and one 40 has a house on it and they live in it and cultivate the other 40, please advise if there is a plan where he can get exemption on both tracts or not."

I assume from your letter that 40 acres of the land lies in one county and 40 acres in another county, but I am not sure that it is the counties or the tracts which are adjacent. If the two tracts are cultivated in common and used as a common source of revenue for the support of claimant and his family, both may be claimed as exempt, provided they are within the assessed value of two thousand dollars, even though, they are not adjacent or contiguous. If they are adjacent or contiguous and used by the claimant as his homestead, both tracts may be claimed as exempt, but not to exceed \$2,000 in assessed value. **Dicus v. Hall**, 3 So. 239, 83 Ala. 159.

It is the duty of the tax assessor in each county to grant a proportionate homestead exemption. The total of the combined claims filed in the counties should not exceed in area 160 acres and in value two thousand dollars. Act 107, General Acts, 1936-37, page 113.

Yours very truly,

A. A. CARMICHAEL,
Attorney General

August 14, 1937.

Hon. D. R. Boyd, Deputy Solicitor,
Randolph County,
Roanoke, Alabama.

Deputy Solicitor—Held not entitled to extra compensation for rendering opinion to Probate Judge concerning legality of proceedings of bond sales of the county.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of June 28, 1937, in which you request my opinion as follows:

"Some months ago this county voted a bond issue to make available funds to match funds of the Federal Government for enlarging the courthouse and rebuilding the county jail. Following the election on the bond issue, the Judge of Probate called upon me for certificates of opinion approving the proceedings for both projects and also for use in the sale of the bonds.

"I am of the opinion, in which the Judge of Probate joins me, that this was an extra or special service not contemplated by subdivision 8 of section 5498 of the Code, and that I am rightfully entitled to reasonable compensation therefor. But to be certain I will thank you for an official opinion on the matter."

In reply, I wish to advise you, in my opinion you, as deputy solicitor, are not entitled to any extra compensation for giving your opinion in writing to the Probate Judge of your county concerning the proceedings for projects for which bonds of the county were sold in order to finance the same.

I am of the opinion that such duties constitute a part of the regular duties of the solicitor as provided for in Section 5498, sub-section 8, Code of 1923, which provides as follows:

"8. All county solicitors, all circuit solicitors, and any solicitor of any court of record, shall give every county official opinion in writing on all matters connected with their respective offices except in suits against official's bonds. But courts of county commissioners or boards of revenue may retain or employ attorneys, when it is deemed advisable or necessary, and the agreed compensation to them may be paid as are claims to grand and petit jurors."

In my judgement, the law is very specific on this point, the solicitor or the deputy solicitor when called upon to perform the duties outlined here is subject to the rule that the public officer takes office cum onere and is not entitled to any additional compensation for performance of these duties which fall within the line and scope of the office itself.

If the services outlined by you in your request do not come within the official duties of the solicitor, then, compensation for the same would necessarily necessitate a contract between the deputy solicitor and the county which is expressly prohibited by law under the provisions of Section 5024, of the Code of 1923, which provides as follows:

"Section 5024. County officer interested in county contracts.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers."

I wish to further refer you to Biennial Report of Attorney General, 1932-34, page 306, and authorities cited therein. See also Office Edition Book 5-A, page 201.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 14, 1937.

Hon. H. E. Kendrick,
Tax Collector,
Dallas County,
Selma, Alabama.

Property exempted from taxes may be assessed under escape assessment with taxpayer's consent.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date, in which you request my opinion as follows:

"At the tax sale of 1935 for 1934 taxes the City of Selma bought a large number of pieces of property for taxes. Since the 1935 taxes had been assessed prior to the tax sale the City paid the 1935 taxes due on the properties they had bought at the tax sale when the taxes became due the following October. These properties are assessed to the City of Selma on the 1936 abstract furnished this office by the Tax Assessor, and marked 'Exempt', thereby making no 1936 taxes due this office.

"Several of the taxpayers, whose property was sold as mentioned above, now wish to redeem their property and in addition to paying the 1934 and 1935 taxes to the Probate Judge, they wish to pay their 1936 taxes in order to clear their titles to their property.

"Since the taxes on these properties are not charged to me the abstract furnished by the Tax Assessor, I wish to have the following points cleared up for me:—

"1. Should I collect the 1936 tax in a case as described above?

"2. If I am authorized to collect these taxes, what procedure should I follow in the collection of same, as the property cannot be described as an Escape under these conditions.

"Please let me have an opinion on the above as soon as possible, as the taxpayers are insisting on paying their taxes now."

Under opinion rendered to you under date of May 15, 1936, reported in Quarterly Report of Attorney General, Vol. III, page 134, you were advised that in my opinion property sold to the City of Selma would not be subject to assessment for State and County taxes while owned by the City. Under these circumstances the Tax Assessor was correct in listing this property as exempt and you have no authority to collect the 1936 taxes except as set out hereafter.

It is my understanding from you that the taxpayers now wish to redeem and wish to pay their 1936 taxes in order to clear their title to the property. While ordinarily the tax collector should follow the abstract of the assessment. Quarterly Report of Attorney General, Vol. III, page 148, you are required by Section 189 of the Revenue Act of 1935 to make escape assessment if you discover "that any person or property within his county has not been assessed with the tax or taxes lawfully chargeable to such person or property for that year or any preceding year". Under my opinion set out above, there are no such taxes lawfully taxable to the property for the period it was owned by the City. However, the only party who could object to this is the owner of the property and if it is his wish and if he concurs in the escape assessment made by you, then you have authority to collect taxes under such escape assessment.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 14, 1937.

Hon. J. N. Baker, M. D.,
State Health Officer,
Department of Public Health,
Montgomery, Alabama

County Budget Act—

Court of County Commissioners may amend current year's budget so as to include the additional revenue accruing from sales and beverage taxes.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 16, 1937, in which you request my opinion as follows:

"Your opinion is sought on the following question:

"Under the County Budget Act has a court of county commissioners the privilege of amending a current year's budget so as to include revenue accruing from the sales and beverages taxes; and to substitute same for items already set up in the budget?"

In my opinion, the Court of County Commissioners has the authority to amend a current year's budget so as to include the additional sales and beverage taxes. Cf. Opinion to Board of Revenue and Road Commission of Mobile County, dated June 11, 1937.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 14, 1937.

Hon. Bart B. Chamberlain,
Circuit Solicitor,
Mobile County,
Mobile, Alabama.

Constitutionality—Local Act No. 47, (p. 33), H. B. 209, approved January 27, 1937, for relief of William J. O'Connor, is constitutional and valid.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 5, 1937, which is as follows:

"On Page 31 of the General Acts of the Legislature of 1927 you will find an act to provide for the appointment of a stenographer by each Solicitor of each judicial circuit in the State, now or hereafter created composed of one County having more than two Circuit Judges and less than nine Circuit Judges, etc. Under authority of this act I appointed Mr. William J. O'Connor as my official stenographer at a salary of twenty-

"one hundred dollars per year as provided for in said Act. Under this act Mr. O'Connor operated as such official stenographer for me as Solicitor and was regularly paid his salary down until about June, 1935.

"William A. Conrad, Deputy Clerk of the Circuit Court of this county, under a similar act sought to collect certain monies from the County of Mobile and the Supreme Court very definitely held that the act was unconstitutional in that it was a local act and had not been advertised. I here make reference to the case of the State ex rel Conrad v. Board of Revenue and Road Commissioners, et al, 163 Southern 345. After this opinion was handed down the Treasurer of Mobile County declined to pay warrants issued by me on the County Treasurer and payable to William J. O'Connor as my official stenographer. He took the position the court might hold the act, under which Mr. O'Connor was employed, was a local and not a general law and in view of the fact that it had not been advertised it was therefore unconstitutional. Mr. O'Connor continued to work, however, for me as my official stenographer for three months and nine days and at the expiration of this time there was due him \$560.00 by the County of Mobile. You will recall about this time (September, 1935) the Legislature was in special session and I succeeded in having a local bill, which had been duly advertised, passed and from that time on the Treasurer paid Mr. O'Connor's salary under authority of the local law.

"As stated above, this left the sum of \$560.00 due Mr. O'Connor for the months of June, July, August and nine days in September, 1935. Under Section 186 of the Code of 1923 I find that the Board of Revenue and Road Commissioners may appropriate from the general or special funds of the county such sums that such governing body feels should be used to reimburse any person who in good faith performs services for the County. Certainly Mr. O'Connor in this instance performed services for the County and I am of the opinion that the County has authority under this section of the code to pay Mr. O'Connor the said sum of five hundred and sixty dollars for said services.

"To strengthen this situation, however, I had a bill passed by the Legislature of 1936-37 for the relief of Mr. O'Connor, which bill was signed on January 27, 1937, and is known as House Bill 209. I enclose herewith a copy of this act as passed and I feel that the County Treasurer is authorized under this act to pay Mr. O'Connor the said sum of \$560.00 for services rendered by him during the months of June, July, August and part of the month of September, 1935. In other words, in my opinion, the Treasurer of Mobile County is authorized, empowered, and directed by the terms of this act to pay Mr. O'Connor the said sum of \$560.00 on a warrant drawn by him for said amount. I might add, in my opinion, the County Treasurer feels that this item should be paid and will do so if you, as Attorney General, express an opinion to the effect that he can properly pay the same."

In view of the above you request my opinion as to whether or not the Local Act in question (Act No. 47, H. B. 209) approved January 27, 1937, is constitutional and valid and if the County Treasurer of Mobile County would be authorized to make payment to Mr. O'Connor in accordance therewith.

I am of the opinion that your inquiry should be answered in the affirmative.

The Local Act in question is a relief bill for the benefit of William J. O'Connor who had performed services for the benefit of Mobile County, al-

though there is some doubt as to whether or not he could collect his compensation therefor through legal channels. Said Local Act was properly advertised as required by Section 106 of the Constitution of 1901.

Since the local bill in question was a relief bill, properly passed, in payment of moral obligation due Mr. O'Connor for services performed by him for the benefit of Mobile County, the question presents itself as to whether or not the Legislature had authority to pass said bill. In other words, would the Legislature have authority to reimburse Mr. O'Connor for services performed by him for the benefit of Mobile County the payment thereof being in legal doubt.

I am of the opinion that this inquiry should be answered in the affirmative under authority of the cases of **Moses v. Tigner**, 168 So. 194 and **Board of Revenue and Road Commissioners of Mobile County v. Puckett**, 149 So. 850. The assumption is that the Legislature has acted in good faith for reimbursement and recognition of moral obligation as disclosed from the face of the act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 16, 1937.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Alabama Beverage Control Act.

Sections 4736-4739 of the 1923 Code of Alabama relative to sacramental wine are not repealed by the passage of the Alabama Beverage Control Act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of June 9, 1937, with a letter from Hon. Leo. M. Brown, which letter is as follows:

"Hon. Matt A. Boykin,
Judge of Probate,
Mobile, Alabama.

"Dear Sir:

I hand you herewith a form of permit for the procuring of wine for sacramental purposes under the provisions of Sections 4736-4739 of the Code of Alabama, which permit I request that you please issue to me. It is my opinion that these sections of the Code are not repealed by the Alabama Beverage Control Act, in view of the fact that Section 58 of the said Act specifically authorizes the acquiring the wine for sacramental purposes in the very language of Section 4736 of the Code, and the evident intention of the Legislature was to preserve the right to acquire such wines under the preexisting law. Any other construction would

result not only taxing the use of wine for religious purposes, but would also obstruct or altogether prevent the procuring of certain particular religious wines, which was certainly not the intention of the Legislature, the Beverage Control Act being intended merely to regulate the importation, sale and possession of beverage liquors. I therefore respectfully request that you issue the permit as soon as possible."

You request my opinion:

Are Section 4736-4739 of the 1923 Code of Alabama repealed by the passage of the Alabama Beverage Control Act?

In my opinion your question should be answered in the negative.

Section 4736 of the 1923 Code specifies the persons who are entitled to purchase and receive wines for sacramental purposes. Sections 4737-4739 provide the procedure in making said purchases.

Section 58 of the Alabama Beverage Control Act is as follows:

"Section 58. Regularly licensed physicians, dentists, and/or any person holding a license to practice medicine, or to engage in any profession wherein the treatment of the human body and/or of an animal body is necessarily involved, clinics, non-commercial laboratories, hospitals, and/or sanatoria may acquire, own and dispense for medicinal, mechanical or scientific purposes only, and not for beverage purposes, any alcoholic beverage and/or ethyl alcohol; also any minister, pastor or officer of a regularly organized, religious congregation or church, and any other person who, under the ritual of any recognized religious denomination, is authorized or required to use wine for sacramental or religious purposes in the ceremonies or ritual of such religious denominations."

I call your attention to the fact that in the latter part of the section, supra, the same verbiage is used as in Section 4736 of the 1923 Code, which to my mind shows that it was the intention of the Legislature that certain persons were still entitled to purchase and receive sacramental wines, and were exempt from the operation of the Alabama Beverage Control Act as long as the wines were not used for beverage purposes. As no procedure was provided by the Alabama Beverage Control Act for the purchase of said wines, they should be procured as provided by Sections 4737-4739 of the 1923 Code.

"As the intention of the Legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the Court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provision, or is inconsistent with the organic law of the State, to the intention or purpose of the legislature as expressed in the statute."—59 Corpus Juris, p. 948.

Street v. Coe, 207 Ala. 631, 93 So. 591; Sunflower Lumber Co. v. Turner Supply Co., 158 Ala. 191, 48 So. 510.

I do not think that Section 58 of the Alabama Beverage Control Act deals fully and completely with the entire subject of Sections 4736-4739 of the 1923 Code of Alabama, so as to take the place and repeal the same. See opinion of this office to Hon. J. A. Keller, Superintendent of Education, under date of May 29, 1937, a copy of which is enclosed for your convenience.

Of course, there is no prohibition against the purchase of sacramental wines from the State Stores, in which event it would not be necessary to ob-

tain a permit from the Probate Judge as provided by Section 4737 of the 1923 Code of Alabama, as this permit is only applicable to purchases made other than from the State Stores.

The premises considered, it is therefore my opinion that Sections 4736-4739 of the 1923 Code of Alabama, are still in full force and effect not having been repealed by the passage of the Alabama Beverage Control Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 16, 1937

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

License—Loan office—

Person operating more than one loan office in same county is due license on each such office he operates, whether one office is a branch office or not and whether the offices are operated under the same name or not.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letters in which you request my opinion as follows:

"Will you kindly give us an opinion on Schedule 93½.2, where a person has more than one office in a County and operated under the same name:

"We have one case where a person has two offices located in Mobile County, but no records are kept in the branch office—only a card system.

"Another case where the same person has two offices in different locations in Mobile County operated under the same name.

"And still another case where the same person has two offices in the same County but operated under different names."

In my opinion, a person who operates more than one loan office in the same county is liable for the license levied by Schedule 93½.2 on each such office which he operates, whether one office is a branch office or not, and whether the offices are operated under the same name or not.

Schedule 93½.2 reads as follows:

"Each person engaging in business of lending money on salaries or making industrial or personal loans shall pay an annual license of one hundred dollars for each county in which they engage in business."
Section 354 of the 1935 Revenue Act reads as follows:

"Every license granting authority to engage in or exercise any business, employment or profession, unless expressly authorized elsewhere or other-

wise, shall designate the place of such business, employment or profession at some specified house or other definite place within the county of the Probate Judge granting it. Engaging in or exercising any such license, business, employment, or profession elsewhere than at such house or definite place, unless expressly authorized elsewhere or otherwise by law, shall be held to be without license. A license which does not specify such house or definite place where business, employment, or profession is limited thereto by law, shall be void." (Emphasis ours)

while Section 356 provides:

"Where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business." (Emphasis ours).

In view of the very clear provisions of the above quoted sections of the Revenue Act, it is my opinion that a person who operates more than one loan office in a county is liable for the license levied by Schedule 93½.2, supra, on each such office he operates, whether one of the offices is a branch office or not, and whether the offices are operated under the same name or not.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 16, 1937

Hon. I. I. Moses, Chairman,
County Commission,
Russell County,
Phenix City, Alabama.

Jails—Charge for refrigeration not authorized when refrigerator is in home of sheriff.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

I have your letter of June 12, 1937, in which you state as follows:

"The County Commission would like to be advised about the following matter:

"The Sheriff of the County has been presenting claims to the County Commission for refrigeration. In other words he has a refrigerator which he used for the purpose of keeping food for prisoners at the County jail. Please advise us whether or not the County is authorized to pay for refrigeration for this purpose, in the event the refrigerator is kept in the Sheriff's home. If not, can payment be made when refrigerator is kept at the jail."

In my opinion the County is not authorized to pay for such refrigeration if the refrigerator is kept in the Sheriff's home—Quarterly Report of Attorney General, Vol. VI, pp. 112, 113.

If, however, the refrigerator is part of the equipment of the kitchen in the jail, it is my opinion the county would be liable for its upkeep.—**Quarterly Report Attorney General, Vol. II, p. 241.** The county is authorized to purchase a refrigerator.—**Opinions Attorney General (Office Edition) 4-A, p. 42.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 16, 1937

Hon. C. E. McNatt,
Clerk, Circuit Court,
Franklin County,
Russellville, Alabama.

Witness fee—State Highway Patrol Officer is not entitled personally to witness fee in any criminal case. Such fee is payable to the State Highway Patrol Fund.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

I have your letter of June 29, 1937, in which you request my opinion as follows:

"The Sheriff of the County commenced a prosecution in the Law and Equity Court by making a proper affidavit and having a Writ of Arrest issued charging a defendant with the offense of possession of illegal liquor. Two State Highway Patrol Officers were summoned as State witnesses in this case, and these two officers attended Court as State witnesses. The defendant was convicted.

"Were these two Highway Patrol Officers entitled to receive witness attendance fees and mileage for attending said trial, or should said witness fees and mileage due such officers be turned in to the State Highway Patrol Fund?"

In my opinion a State Highway Patrolman is not entitled to be paid any witness fee for attending court in a case which involves a violation of the Highway Code or any criminal laws. The duty of serving as a witness in highway violations is impliedly imposed upon a Highway Patrolman by the provision in Section 11 of the Highway Patrol Act which reads in part as follows:

"* * * no State Highway Patrol officer shall be entitled to any costs for attending any courts, but instead, the proper authorities shall collect such fees and mileage that are due such officers for attendance on any court or for any official act and promptly turn same into the Highway Patrol fund * * *"

This provision clearly indicates that, in the opinion of the Legislature, the Highway Patrol officer would have been entitled to the fees for attending court had not the above quoted provision been enacted. Now reading this provision in pari materia with the first sentence of the same section, which is to the effect that the Highway Patrol officers are charged with:

" * * * the enforcement of the provisions of this Act, to promote the public safety and generally to perform the duties imposed upon the Governor concerning the enforcement of all the laws,"

I am of the opinion that it was the intention of the Legislature to have all witness fees earned by a Highway Patrolman enure to the benefit of the Highway Patrol Fund rather than to his personal benefit. In my opinion, the above quoted section was intended to cover just such a case as you present, i. e. to make it incumbent upon all Highway Patrol officers to attend court in criminal cases, when summoned, without personally receiving witness fees.

Of course, the above provisions would not prohibit a Highway Patrolman, as a private citizen, from attending court in a civil case and claiming his witness fee. This, however, is entirely different from a case involving the illegal possession of liquor which is a criminal offense and therefore within the province of, "the duties imposed upon the Governor concerning the enforcement of all the laws."

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 16, 1937.

Hon. John Ben Darden,
Tax Assessor, Chambers County,
Lafayette, Alabama

Taxation—Homestead exemptions

Single person away from home on business during a large part of the year, who rents same to another but reserves rooms and actually occupies them part of year and who complies with Section 7914 of Code of 1923, is entitled to tax exemption provided by Acts, Extra Session 1936-37, page 113.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Miss Sarah Tatum of LaFayette, Ala. owns a House and lot in LaFayette. She came into my office and claimed Homestead Exemption. She had filed a Declaration of Temporary Absence in the probate office. I understand that she rents this house to Ben James, he and his family live there. Miss Tatum reserves rooms in the house and has her own furniture in her rooms and lives there several months in the year. She teaches school somewhere in Tennessee during the school months but claims this as her home.

"Please advise me if she is entitled to the Homestead exemption."

In my opinion, your inquiry should be answered in the affirmative.

This office has recently held in an opinion to the Tax Assessor of Dale County, dated August 10, 1937, See Office Edition Book 17-A, that single

persons are entitled to the exemptions from taxes levied on homesteads provided by Acts, Extra Session, 1936-37, page 113.

Section 1 of said Act provides:

"Section 1. The word 'homestead' as herein used is the 'homestead' as now defined by the Constitution and Laws of the State of Alabama."

Section 7914 of the Code of 1923 provides:

"7914. When homestead not abandoned by leasing or temporary leaving.—When a declaration of claim to a homestead exemption has been filed in the office of the judge of probate, leaving the homestead temporarily, or a leasing of the same, shall not operate an abandonment thereof, or render it subject to levy and sale; but the right thereto shall remain the same as if the actual occupancy thereof had continued."

In my opinion, under the facts stated in your letter of inquiry, the exemption is entitled to exemption from state taxes upon her homestead. **Fuller v. Americian Supply Co.** 185 Ala. 512.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 17, 1937.

Hon. W. H. Lindsey,
Judge of Probate,
Choctaw County,
Butler, Alabama.

County Commissioners—Under facts as stated, Commissioners Court of Choctaw County may rent rooms for short time, for the use of the county health unit in cooperation with the State Board of Health and the Federal Government, and pay the rent from the Sales Tax Fund.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of July 17, 1937, in which you state:

"Choctaw County has made appropriation from the Sales Tax to support a health unit in the County. The county court house is now overcrowded and there is no room available for the personnel of the health unit."

You request my opinion:

"Can or will it be legal for the Commissioners Court to rent rooms for a short time for the use of the health unit and pay the rent from the Sales Tax Fund?"

In my opinion your question should be answered in the affirmative. This office has previously ruled that under Section 21 of Act No. 126, H. 179, approved February 23, 1937, (General Acts 1936-1937, Extra Session, p. 125), it is mandatory upon the Commissioners Court, Board of Revenue, or other governing bodies of the counties to use the proceeds from the Sales Tax exclusively

for full time health service in cooperation with the State Board of Health and the Federal Government, etc. See opinion of this office to Hon. P. C. Black, Judge of Probate, Geneva County, Alabama, under date of April 27, 1937, a copy of which is enclosed for your convenience.

As the county health unit dispenses full time health service and it is essential that the unit has suitable offices in order to function properly, it is, therefore, my opinion that the Commissioners Court of Choctaw County may rent rooms for a short time for the use of the county health unit in cooperation with the State Board of Health and the Federal Government.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 17, 1937.

Hon. J. A. Carnley,
Judge of Probate,
Coffee County,
Enterprise, Alabama.

Mortgage Tax—Required on mortgage given by church.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

I have your letter of May 11, 1937, in which you state as follows:

"A mortgage from the Trustees of the New Brookton Methodist Episcopal Church, South, to the Board of Church Extension of the Methodist Episcopal Church, South of Louisville, Kentucky, in the amount of \$3,-500.00 was filed this day, in this office for record. I would like to have your opinion as to whether this mortgage would be subject to the mortgage tax as required by Acts of 1923."

It is my opinion that the recording of such a mortgage necessitates the payment of the privilege tax provided in Act No. 172, Section 4½, General Acts 1923, page 152, as amended by Act No. 194, Schedule 94 of Section 348, General Acts 1935, page 477.

I find no statute exempting mortgage given by a church from this privilege tax. It is true that Section 3022, Code of Alabama, 1923, enlarges upon the exemptions set out in Section 91, Constitution of Alabama, 1901, and provides, among other things, that all property, real and personal, used exclusively for religious worship, shall be exempt from ad valorem taxation. The filing tax required on a mortgage, however, cannot be considered an ad valorem tax, though it is based upon the consideration of said instrument. It is privilege tax upon the privilege of filing the mortgage and thereby securing the benefits which inure to such a recorded instrument.—*Crosland v. Federal Land Bank*, of New Orleans, 207 Ala. 456, 93 So. 7.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 17, 1937.

Hon. Howell Turner,
Secretary of State,
Capitol.

Corporations—Social clubs organized under Article 23 (Sections 7167-92), Code, do not come within provisions of Section 6975, Code, providing for statement to be filed with Secretary of State.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of July 6, which is as follows:

"Section 6975 of the Code of Alabama of 1923 provides that a report of every corporation organized in the State be sent to the Secretary of State by the Judge of Probate of the county in which the corporation organized, together with a filing fee of \$2.50.

"Section 7176 provides for the incorporation of social clubs and societies for the social or literary advancement of their members or both. I call your attention to Section 7192 which reads as follows:

" 'Exemption from taxation and license.—The property of corporations formed in good faith hereunder for other than pecuniary purposes and not for individual profit shall be exempt from all state, county and municipal taxation and licenses; but if used for any other purpose than legitimately pertains to the object of such society, it shall not be so exempt.'

"I especially refer you to Section 7183 of the Code which provides that the Judge of Probate, for recording and other services in and about the organization of such corporations under Article 23 shall be entitled to the same compensation he receives for similar services under existing laws.

"In view of the fact that Section 7192 provides for an exemption from taxation and license, and Section 7183 provides for the same compensation being paid the Judge of Probate he receives for similar services under existing laws, please advise if the office of Secretary of State should receive the \$2.50 filing fee paid the probate judge for this office."

In my opinion, the answer to your inquiry is in the negative.

This office has long held that Section 6975 applies only to business corporations organized under Article 1 (Sections 6964-80), Code of Alabama 1923, and not to corporations of a different nature.—**Biennial Report of Attorney General**, 1930-32, page 883. As the corporation referred to is a social club organized under Article 23 (Sections 7167-92), Code of Alabama, 1923, it is liable only for the taxes set out in said Article 23. There is no provision in this Article for the payment of the \$2.50 fee to the Judge of Probate for the use of the state.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

August 17, 1937.

Hon. Porter McKay,
Official Court Reporter,
19th Judicial Circuit,
Wetumpka, Alabama.

Statutes—General Act reading “according to the last preceding or any subsequent Federal census” means census preceding reclassification from time to time and not preceding passage of Act.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge receipt of your letter of July 13th, 1937, which is as follows:

“I enclose herewith caption of an Act approved by the Legislature of Alabama, on June 18th, 1931. This Act was drawn by Judge Geo. F. Smoot, and the intention of the act was to supplement the salary of the Court reporter for the 19th Judicial Circuit.

“After the passage of the Act of the Legislature, I went before the Court of County Commissioners of Chilton County, and passed a resolution supplementing my salary \$75.00 a month, for a term of one year. The resolution was entered on the minutes, and afterwards changed so as to ‘unanimously pass it over until the next meeting of the Court of County Commissioners’, after it was called up on motion of one of the members, and ‘unanimously passed’. The words ‘over until the next meeting of the court of County Commissioners’ being added.

“The population basis was figured by Judge Smoot at the time the bill was drawn, and then after the passage of the resolution by the Commissioners Court in July 1931, when I went to Clanton and fixed up a contract Mr. Omar Reynolds, County Attorney, and I figured on the population at that time, and it was within the limits.

“Another Probate Judge is now in Chilton County, and new County Commissioners, and I got this matter up to the point the matter was to be voted on, on July 5th, when Mr. Omar Reynolds who is still County Attorney raised the proposition about the population limitation, and the Commissioners Court, and Probate Judge requested that I get your opinion on the population proposition at this time. It has now been six years since this act was passed, and six years since the matter was passed by the Commissioner Court—and then the minutes changed—so as not to pass it.

“Judge Smoot evidently took the population by the Federal census of 1910, as the last preceding census, and the population at the end of 1920, as the next succeeding census—as the 1930 census was not out, as I understand it until sometimes after 1931—and was not out at the time Judge Smoot figured the population basis—or limitation.

“I have written you quite at length on this proposition—in order that you might see the situation in reference to this matter.

“The whole intent and purpose of the act was to apply to the 19th Judicial Circuit. Of course, six years after the act was passed makes a difference in the population—but the circuit population was within the

"limits when the act was passed—and when the attempt was made to put it in force.

"The proposition the Probate Judge and Commissioners Court asked me to get your opinion on, is as to the population, as stated in the caption of the act.

"If you can give me the opinion of your office on this proposition, I will appreciate it very much."

"To authorize and empower the County Commissioners, Boards of Revenue, Courts of County Revenue or Boards or Courts of like Power in any County in a Judicial Circuit composed of three Counties, and having one Circuit Judge, where the total population of said Circuit is not less than 65,000 and not more than 72,000, according to the last preceding or any subsequent Federal census, to contract with the Court reporter of said Judicial Circuit, to report testimony in Equity cases in the Court of such county, to provide for the disposition of the fees for such reporting, and to fix the compensation supplementary and in addition to the salaries paid to such court reporters by the Judicial Circuits of the State, in consideration of said reporters reporting testimony in certain Equity cases, certain preliminary trials and habeas corpus and contested will cases before Probate Judges.

"General Acts 1931, page 333."

In answer to your inquiry, advise that in my opinion it is a question of fact which determines whether or not the 19th Judicial Circuit comes within the province of Act No. 283, General Acts 1931, page 333.

It is a long established rule of statutory construction that the words "according to the last preceding or any subsequent Federal census" mean the last census preceding reclassification from time to time, and not to the census immediately preceding the passage of the Act.—*State v. McLellan*, 202 Ala. 41, 79 So. 379; *Board of Revenue of Jefferson County v. Huey*, 195 Ala. 83, 70 So. 744.

Since the 19th Judicial Circuit has a population of 78,553 according to the last official Federal census, the provisions of Act No. 283, supra, are not applicable to said circuit. These figures, taken from the **Official and Statistical Register** of Alabama for 1935, are based on the Federal census of 1930.

Yours very truly

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Montgomery, Alabama.

Judgements—Execution may issue on judgment at any time within ten years of rendition. Section 7863, Code of Alabama, 1923.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of July 8, 1937 in which you ask the following question:

"May or can execution issue on a judgment within ten years when an execution has not been sued out within one year after its rendition, until the same has been revived by scire facias, if the judgment was not recorded within twelve months after its rendition?"

"In connection with this I wish to call your attention to Sections 7793 and 7863 of the Code of 1923."

It is my opinion that your inquiry should be answered in the affirmative. Section 7863, Code of Alabama, 1923, provides as follows:

"7863. No execution shall issue on a judgment or decree of the circuit or probate court on which an execution has not been sued out within ten years of its rendition, until the same has been revived by scire facias. If the defendant is a resident of the state, personal service must be had upon him, of the scire facias, requiring him to show cause within thirty days, why the plaintiff should not have execution. When the defendant is a nonresident, or cannot be found, service may be had in the manner provided by law for notice to nonresidents."

The above quoted section is a revision, by the Code Commission in preparing the Code of 1923, of Section 4148, Code of Alabama 1907, which is in part as follows:

"4148. No execution shall issue on a judgment or decree of the circuit, **chancery**, or probate court, on which an execution has not been sued out within **one** year of its rendition, until the same has been revived by scire facias, **unless the judgment has been recorded within twelve months from rendition**....."

The underlined portions of Section 4148, indicating the changes made in bringing forward the section, show a clear intention to keep a judgment alive for ten years in spite of the fact that execution was not sued out within a year, and also in spite of the fact that the judgment was not recorded. **After** ten years, and prior to the expiration of twenty years from the date of its rendition the judgment can be revived by a writ of scire facias. **Mobile Drug Co. v. McCullough**, 215 Ala. 682, 112 So. 238, *Jones et al vs. Jefferson County*, 215 Ala. 19, 108 So. 760.

Section 7793, Code of Alabama, 1923, provides that a party in whose favor a judgment has been rendered may, within a year, have a judgment of fieri facias against the lands and goods of the person against whom the judgment is rendered. Section 7876 provides that when a judgment has been filed and registered with the Judge of Probate, execution may be issued within ten years from the date of judgment, regardless of whether or not execution has been issued previously. But, to give any meaning whatever to Sections 7862 and 7863, it is necessary to regard them as granting additional rights to an owner of a judgment.

In the case of **State, ex rel. Jernigan v. Ham**, 13 Ala. App. 648, 69 So. 253, the court, in speaking of Section 4148, quoted above, holds:

".....if the judgment had been so rendered (within the year specified) a valid execution could have issued on it, even after the lapse of a year from its rendition, although no execution was issued on it within a year after its rendition."

You will note that the above quotation is with reference to Section 4148, Code of Alabama, 1907 which provided the one year limit. Section 7863, Code of Alabama, 1923, as stated amends the old Section 4148 by providing ten years rather than one year. See *Quill v. Carolina Portland Cement Co.*, 220 Ala. 134, 124 So. 305.

In my opinion, execution may be issued at any time within ten years.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Taxation—

1. Probate Judge, on signing a decree for sale against a piece of property delinquent for taxes, does not assume any responsibility for the accuracy of the figures contained in said decree, provided, of course, that the figures contained in the decree are in accordance with the figures furnished him by the Tax Collector, as provided by Sections 215 and 216 of the Revenue Act of 1935.

2. Tax Collector is responsible for the accuracy of figures furnished by him to the Probate Judge in accordance with the provisions of Sections 215 and 216, supra.

3. If an error in said figures furnished by the Tax Collector to the Probate Judge is due to an error in the figures furnished the Tax Collector by the Tax Assessor, then, of course, the Tax Assessor and not the Tax Collector would be responsible for the same.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of July 9, 1937, as follows:

"Do I, as Probate Judge, on signing a decree of sale against a piece of property delinquent for taxes assume any responsibility for the accuracy of the figures contained in said decree—particularly interest from date of delinquency to the date of sale—such figures, of course, having been supplied me by the Tax Collector? If this responsibility does not adhere to me, then please state to what officer it does attach."

In my opinion, you, as Probate Judge, on signing a decree of sale against a piece of property delinquent for taxes, do not assume any responsibility for the accuracy of the figures contained in said decree, provided, of course, that the figures contained therein are in accordance with the figures furnished you by the Tax Collector in accordance with the provisions of Sections 215 and 216 of the 1935 Revenue Act. These sections provide as follows:

"Section 215. It shall be the duty of the tax collector, at the expense of the county, to procure a substantially bound book in which he shall enter, in the manner usual in docketing causes for trial in the circuit court, each parcel of real estate, or right or interest, or easement therein, assessed to any person against whom taxes have been assessed which are not paid, when a portion of all such taxes are on such real estate, or right or interest or easement therein, describing the same in the same manner as it is described in the assessment list, and stating the amount of the unpaid taxes, penalties, fees and charges due by such person, specifying the amount due the State, and due the county, and to special tax districts, and that for fees and charges; and he shall in like manner, enter in such book each parcel of real estate, or right or interest or easement therein, which has been assessed to an 'owner unknown' the amount of taxes, fees and charges due thereon, stating in each case the fact that it was so assessed. The description of such real estate, or right or interest or easement therein, shall be entered in alphabetical order, if known, and they reside in the county, but if they are unknown and do not reside in the county, then by the precincts in which the real estate is situated."

"Section 216. Such book shall be prepared in a neat and orderly manner either in a fair and legible handwriting or typewritten with sufficient space in each case to make the necessary entries, and in other particulars, in a manner suitable for the purpose for which it is to be used; and if it is not thus prepared, the judge of probate shall cause it to be so prepared at the expense of the collector, and the cost thereof shall be deducted from his compensation. Such books shall be delivered to the judge of probate on or before the first day of March, but if from any cause there has been a failure to deliver the same by that time, it may be delivered thereafter."

Therefore, it seems very clear that the responsibility for the accuracy of these figures devolves upon the Tax Collector who is charged, by the provisions of the Revenue Act, *supra*, with the duty of furnishing the same to you, and not upon you, as Probate Judge.

Of course, if there was an error in the figures so furnished you by the Tax Collector, which error was due to an error in the figures furnished to the Tax Collector by the Tax Assessor then the Tax Assessor, and not the Tax Collector, would be the official responsible for the error, since he was the official who made the error.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. J. A. Moody,
Register, Circuit Court,
Colbert County,
Tuscumbia, Alabama.

Register of Circuit Court in Equity held without authority to issue an attachment for the arrest and commitment to jail of a person in contempt of court for non payment of alimony according to

a decree of the court, the same being within the province of the judge or chancellor of said court and not the register thereof.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter which follows:

"I desire a ruling from your office in regard to my duties under Article 34 of Chapter 267 of the Code.

"The Judge of the Circuit Court in Equity has rendered a decree ordering the payment of alimony. The defendant against whom the decree was rendered has failed to pay alimony according to the decree. The complainant in the case has filed with me, as Register of said Court, an affidavit showing the failure of the defendant to pay the alimony which the defendant was directed to pay by the decree.

"Please advise me whether I, as Register, have authority to issue an attachment for the arrest of the defendant and for his committal to jail until he makes such payment."

Section 6646, Code of Alabama, 1923, contains the law giving authority to Circuit Courts in Equity to enforce their decrees, orders or rules by attachment against a party in contempt for non compliance therewith. This section reads as follows:

"Circuit courts in chancery or equity proceedings may also enforce their decrees, orders and rules by process of attachment against the party or officer in contempt, or by process of sequestration against his property."

If a party fails to comply with an order or decree of your Circuit Court in Equity, such as failing to pay alimony in accordance with a decree of the court calling for the payment of the same, as the party mentioned in your letter has done, then, the Judge or Chancellor of your court may, in accordance with the authority granted to him by Section 6646, supra, adjudge the party in contempt of Court for failing to comply with the order and may issue an attachment against him for his arrest and commitment to jail. However, this is a matter that is within the province of and addresses itself to the Judge or Chancellor and not to the Register. Of course, if the Judge or Chancellor adjudges the party in contempt and orders an attachment to issue against him for his arrest and commitment to jail, then, of course, you, as Register, should issue the attachment, but you are without power or authority to do so unless you are so ordered by the Judge or Chancellor of your court.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. J. P. Mitchell,
Judge of Probate,
Henry County,
Abbeville, Alabama.

Deed filing tax—

Deed executed only for the purpose of perfecting title, which recites the same consideration recited in a former deed conveying the same property on which the deed filing tax has been paid, is not subject to the deed filing tax provided by Schedule 46 of the 1935 Revenue Act, notwithstanding the recitation of the consideration therein.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of July 9, 1937, which follows:

"In winding up or closing out the interest of E. L. Glover, deceased, of the two lumber companies, to-wit: Richardson-Glover Lumber Company of Abbeville, and Barbour County Lumber Company of Eufaula, a partnership composed of J. R. Richardson and E. L. Glover as to the Abbeville Lumber Company and J. R. Richardson, E. L. Glover and W. H. Golson, as to the Barbour County Lumber Company, it became necessary to go into the Equity Court and obtain a decree therefrom, confirming the sale of the interest of said E. L. Glover, deceased, in said property, to the surviving partner, J. R. Richardson, who became the purchaser of said E. L. Glover's interest.

"It came about that J. R. Richardson, as surviving partner, made a deed to himself to E. L. Glover's interest, but due to the fact that there were minor heirs of E. L. Glover's estate, it was deemed wise and proper to have Eva Mae Glover, surviving widow of E. L. Glover, deceased, to file her bill in the Equity Court of Henry County as administratrix of said estate and individually, and in which bill said J. R. Richardson and said minor children were made parties respondent, and asked for a decree authorizing her as such administratrix, to execute a deed to said J. R. Richardson, and since J. R. Richardson had already executed a deed to himself as the surviving partner, the bill in Equity also prayed for a decree confirming the sale by said Richardson to himself. The proceeding went through the Equity Court and a decree was rendered by Judge Halstead authorizing Eva Mae Glover to execute her deed for the estate of E. L. Glover, deceased, to said J. R. Richardson and also confirming the deed made by Richardson to himself.

"Therefore, we have two deeds, both of which pass title to the identical property and both of which have been filed for record in the Probate Office of Henry County, Alabama. Now the question of whether or not a tax should be exacted on both deeds or whether or not the deed of Eva Mae Glover to J. R. Richardson being nothing more than a conveyance to further clarify and make certain the passing of title of the property involved to said Richardson, should also call for a deed tax.

"The property covered by both deeds is the same. The consideration, so far as Eva Mae Glover was concerned in both deeds is the same, the difference which appears, representing the stock or interest of W. H.

"Golson and Allie Gene Farmer in the Barbour County Lumber Company, and which interest was conveyed in the deed from Dr. Richardson, as surviving partner to himself, and the sum of \$31,085.56 as expressed in Eva Mae Glover's deed to Dr. Richardson being the same as received by her and the E. L. Glover estate under the deed by Richardson to himself.

"As already stated, both deeds have reference to the same property and the same consideration, and both have been recorded, the only purpose had in obtaining the deed from Eva Mae Glover, as administratrix, to J. R. Richardson, being to further clarify the title and the deed tax in the amount of \$33.50 has been paid on the deed by J. R. Richardson to himself, as surviving partner, and the question which I am confronted with is as to whether or not I am legally bound to collect a tax on the other deed.

"I am herewith enclosing the two deeds that you may have the advantage of examining them when it comes to giving me an official opinion as to whether or not I should collect a tax on both deeds."

In my opinion, the deed from Eva Mae Glover to J. R. Richardson, being nothing more than a conveyance to further clarify and make certain the passing of title to the property involved therein to the said Richardson, which had already been conveyed to him in a deed to himself, as the surviving partner of E. L. Glover, the deceased partner, on which the deed filing tax has been paid, is not subject to the payment of the deed filing tax, notwithstanding the fact that the deed recites the same consideration recited in the deed to J. R. Richardson from himself, as the surviving partner of E. L. Glover, the deceased partner. Schedule 46 of the 1935 Revenue Act is the schedule which levies a filing tax on deeds offered for record. It reads in pertinent part as follows:

"No deed, bill of sale or other instrument of like character which conveys any real or personal property within this State, or which conveys any interest in any such property, **except** the transfer of mortgages on real or personal property within this State upon which the mortgage tax has been paid, **deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate**, and deeds and other instruments or conveyances, executed prior to October 1, 1923, shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit: * * *" (Emphasis ours).

Then follows the schedule fixing the amount of the tax and other provisions not material to this inquiry. It can be very clearly seen from the underscored part of the above quoted provisions of Schedule 46 that deeds or instruments executed for a nominal consideration for the purpose of perfecting title are not subject to the deed filing tax. For this reason, the instrument executed by Eva Mae Glover to J. R. Richardson being, as you stated, only for the purpose of further clarifying or perfecting title in J. R. Richardson to the property involved therein which had already been conveyed to him by another deed on which the deed filing tax has been paid, is not subject to the payment of the deed filing tax provided by Schedule 46, *supra*, notwithstanding the fact that it recites the same consideration which was recited in the deed to J. R. Richardson from himself, as the surviving partner of E. L. Glover, the deceased partner, which was the deed or instrument which conveyed title to the property involved in both instruments (the property involved in both being the same) to the said Richardson and on which the deed filing tax has been paid.

This office has previously held that the Probate Judge has the duty and authority to make inquiry as to the real consideration of the instrument to the end that the proper filing tax may be collected and that he is not bound by the consideration stated therein. See opinion to Hon. W. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, under date of January 9, 1937, Vol. II, Quarterly Report of the Attorney General, page 25. Since you, as Probate Judge, have determined that the deed or instrument from Eva Mae Glover to J. R. Richardson was only for the purpose of further clarifying or perfecting title to the property involved therein and was for a nominal consideration, notwithstanding the fact that it recites the same consideration recited in the instrument to J. R. Richardson from himself, as the surviving partner of E. L. Glover, the deceased partner, which conveyed title to him to the same property and on which the deed filing tax has been paid, the said instrument from Eva Mae Glover, to J. R. Richardson is not subject to the deed filing tax levied by Schedule 46, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. L. J. Lawson,
County Treasurer,
Hale County,
Greensboro, Alabama.

Fine and Forfeiture Fund—Lost claims against, duplicates authorized.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

I have your letter of May 10, 1937, in which you state:

"The Circuit Clerk of Hale County has filed with me a claim covering a number of fees against the Hale County Fine & Forfeiture Fund. He advises me that the original claims have been lost or misplaced by him and the ones mentioned above are duplicates. The originals have never been registered. There are now funds in this account sufficient to pay the duplicate claims. Should the originals show up at any time in the hands of an innocent holder would I, as County Treasurer, be responsible for the payment of them? I hope you will be able to help me out on this as soon as possible."

In my opinion there can be no innocent holder of the lost original claims or certificates against the Fine and Forfeiture Fund. Upon affidavit by the Circuit Clerk that the original certificates are lost, it is my opinion you are authorized to pay duplicate certificates.

In an opinion of this office under date of October 9, 1935, to the State Comptroller (Quarterly Report of Attorney General, Vol. I, p. 37) it is stated:

"A persual of Section 303 (5) will show that registration is no indicia of the legality of the claim, but merely a mode of designating the order in which such claims must be paid."

This office has also held in an opinion, under date of October 4, 1928, to the Clerk of the Circuit Court of Houston County (Biennial Report Attorney General, 1928-1930, p. 14) that the Circuit Clerk is authorized to issue duplicate witness certificates where the original ones have been lost. As the clerk has a record of all certificates, he is able to locate by number the stub of a lost certificate and make a notation that a duplicate has been issued.

By the same reasoning, I am of the opinion that the Clerk of the Circuit Court has authority to issue a duplicate for any lost certificate against the Fine and Forfeiture Fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Roy L. Smith,
County Attorney,
Russell County,
Phenix City, Alabama.

Court of County Commissioners—telephone in office of county commissioners at Phenix City as well as telephone in office at Seale in proper charge if authorized by Commission.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

I have your letter of May 26, 1937, which reads as follows:

"The County Commission would like to know whether or not it has authority, under the Act approved April 19, 1933, (General Acts 1933, page 201) to establish a telephone in the Office of the County Commission at Phenix City, the County site."

In reply to your inquiry, I refer you to Section 6755, Code of Alabama, 1923, as amended by Act No. 622, General Acts 1931, page 759, which provides in part as follows:

"The court (Commissioners Court) has authority * * * (16) To procure and provide telephones for the offices of the circuit judge, the clerk and register of the circuit court, the offices of the sheriff and jailer, tax assessor and tax collector, and the judge of probate in their respective counties, and to pay for the same out of the general funds of the county; and said court of county commissioners or boards of revenue, or like body may, in like manner and for the same officer, establish telephones in both courthouses where the said officers maintain two offices in the county; and must install such telephone upon the request of the officer entitled thereto."

This provision, in my opinion, makes it mandatory to furnish a telephone to specified officers. If the county has more than one courthouse, each specified officer is authorized to request and obtain a telephone for his office in each courthouse.

Act No. 187, General Acts, 1933, page 201, provides as follows:

"Section 1. That Boards of Revenue or Courts of County Commissioners may designate which Offices in the Court House may have telephones installed therein."

The Act has the effect of enlarging but in no way superseding the provisions of Section 6755, Code of Alabama, 1923, as amended. In my opinion, your inquiry should be answered in the affirmative. Quarterly Report, Vol. I, page 193.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Deed executed by executors to carry out will of testator, by which the legal title passes to the devisees, is subject to deed tax.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter as follows:

"Under the terms of a will, duly admitted to probate and record in Lee County, the property of the testator was to be kept and held together by testator's executors for a period of five years after his death, and was to be managed and controlled by them for the benefit and interest of the beneficiaries therein named. After the period of five years from his death, the testator's executors were, upon the written request of either of the parties to the instrument, to make full distribution of the property therein devised to them in trust, to be divided among the beneficiaries equally, share and share alike, and the persons so taking at the time of such distribution were to hold said property so taken absolutely in fee simple.

"The testator having died on the 25th day of February, 1927, and the five-year period for holding the estate together having elapsed on the 14th day of March, 1932, the executors executed a deed to the beneficiaries, which said deed contained the following paragraph:

"Whereas, the widow of the testator, Julia R. Renfro, and each of the children of the testator named as beneficiaries under said will, as modified by the codicil thereto, that is, the undersigned N. P. Renfro, Jr., Clarence M. Renfro and Gladys Renfro, have each survived said period of five (5) years that said estate was to be held together; and, whereas, the parties to this agreement have been advised that under the terms of said will, it is doubtful whether their respective interest in said estate vested absolutely in them upon the expiration of five years from the death of the testator, or whether the same vests absolutely in them only upon an actual distribution of said estate; and, whereas, other terms and provisions of said will are of possible doubtful meaning;

"and whereas, the parties to this agreement are desirous of determining definitely when their respective interests in said estate should vest in them absolutely and their respective shares therein;

"Now, therefore, for and in consideration of One Dollar (\$1.00), each to the other in hand paid by the parties to this agreement, and for the consideration of the mutual covenants and agreements herein entered into, it is mutually agreed and covenanted between the parties to this agreement as follows:

"1. That the time of distribution of the estate of N. P. Renfro, Sr., as provided in said last will and codicil of N. P. Renfro, Sr., be the 14th day of March, 1932, and that from and after this date, it is mutually agreed and covenanted between the parties to this instrument that Julia R. Renfro, N. P. Renfro, Jr., Clarence M. Renfro and Gladys Renfro are each vested absolutely and in fee simple with an undivided one-fourth interest in the estate of N. P. Renfro, Sr., deceased, _____.

"And in furtherance of this agreement, the two executors, who were beneficiaries, granted and conveyed unto each of the beneficiaries an undivided one-fourth interest in the estate of the decedent.

"This instrument further set out that it was executed for the purpose of vesting in each of the individual parties his or her interest in said estate absolutely.

"This conveyance was filed in my office for record on the 6th day of April. Will you please inform me, at your earliest possible convenience, whether or not deed tax is due and collectible upon this instrument, as there is a considerable amount of property involved in the estate and this deed was filed in order that title might be perfected for the sale of some of the property so involved?"

While I do not have the will to which you refer before me, I am of the opinion from your statement that the deed presented for filing is subject to a deed tax. The deed is apparently an instrument executed to carry out the intent of the testator, and further, legal title has apparently remained in the executors until the execution of this instrument, as you state that the will provides that after five years the executors, **upon written request** by one of the parties, were to make distribution of the property.

This situation was commented on in the case of **Hawkins v. Pure Oil Company**, 169 So. 307, in which Mr. Justice Gardner (at page 308) made the following statement:

"Petitioner argues, therefore, that as it already had the legal title, the deed tendered for record was based upon a mere nominal consideration, and for the perfection of its title, within the language of the exception contained in Section 21½, which, so far as here pertinent, reads: 'Except * * * deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate.'

"If, of course, the deed is for the purpose of acquiring the title, even though on a nominal consideration, the exception would not be applicable as illustrated in the opinion of the Attorney General referring to a deed executed by an executor to carry out the will of the testator, and by which deed the legal title passes to the devise." (Underscoring supplied).

Mr. Justice Gardner also made the further statement:

"But this aside, our conclusion is that, in any event, this is not a deed for perfection of title within the meaning of the exception. It is to preserve the evidence of the title and to place in record form the title already acquired. To such a deed the general rule, and not the exception in the statute, applies."

I am, therefore, of the opinion that the deed to which you refer is subject to the payment of the deed tax.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Edgar Underwood,
Judge of Probate and Ex-Officio
Chairman of Court of County Revenue,
Franklin County,
Russellville, Alabama.

Senate Bill 83, Act 157, Special Session 1936-1937, p. 179, does not affect right of Franklin County to pledge part of gasoline tax under Local Act of 1936, Special Session, page 14.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 1, 1937, in which you request my opinion as follows:

"Franklin County is participating, under contract with the State Highway Commission, in paving state highways in the county, by setting aside about \$2,000.00 each month from the gas tax funds it receives from the state and, in addition, is borrowing money as needed for the purpose on interest bearing warrants against anticipated income from said tax, as authorized by local law, 1936 Acts, p. 14. Work under this program will probably not be completed until next year.

"May the Court of County Revenue of Franklin County issue interest bearing warrants for loans, after July 1st, 1937, in accordance with said Local Act, approved March 17, 1936, page 14 of 1936 General and Local Acts, and pledge a part of the gasoline tax to be received from the State for the payment thereof, in view of the general Act approved March 4, 1937, known as Senate Bill No. 83, Chestnut? In other words, does this general act affect our said local law?

"If said general Act affects our said local Act, it will be necessary for the Court of County Revenue to borrow sufficient funds at its meeting on June 14th, 1937, to complete the said paving projects. This would entail interest expense and responsibility for funds for some time before the money is needed, but we do not want our warrants to be questioned.

"In view of the necessity that we have your opinion in this matter by June 14th, I respectfully ask that you give it preference."

The Act referred to approved March 4, 1937, reads as follows:

"Section 1. The revenue, less the cost of collection, obtained from taxes on lubricating oil, gasoline, naptha, and other liquid motor fuels or any device or substitute therefor, commonly used in internal combustion engines as is provided for in Schedule 156.1 of House Bill 324, Approved July 10, 1935, shall not be used for any purposes other than for the construction, improvement and maintenance and supervision of highways and bridges and streets, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes. The payment of the per diem and mileage of members of County governing bodies when engaged in supervising the construction, improvement and maintenance of highways, bridges and streets shall be construed as supervisor under the provisions of this Act.

"Section 2. All laws and parts of laws, general, local and private, in conflict herewith are hereby repealed.

"Section 3. This Act shall go into effect July 1, 1937.

"Approved March 4, 1937."

I find nothing in this Act prohibiting the borrowing of money by the Court of County Revenue of Franklin County, as expressly authorized by Local Acts of 1936, page 14. Under said Local Act, the Court is authorized and empowered to borrow money and to pledge as security for such loan part of future monthly installments of the gasoline excise tax collected by the State of Alabama and paid to Franklin County. However, this right to borrow is limited to the purposes enumerated in Section 1 of this Act, which purposes are for the construction and repair of State or Federal highways within Franklin County. Such purpose enumerated in Section 1 of the Local Act does not conflict with the purposes to which the expenditure of such funds is limited by Act No. 157 of the Special Session of 1936-1937. In my opinion, therefore, said General Act does not affect the right of the Court of County Revenue of Franklin County under the Local Act of 1936, page 14.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. J. P. Mitchell,
Judge of Probate,
Abbeville, Alabama.

Where deed offered for recording recites payment of cash amount with balance deferred, a mortgage tax should be charge on basis of amount shown as deferred payment and deed tax should be on difference between this amount and value of the property.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter which reads as follows:

"A deed containing the following as a consideration has been filed in this office for record.

"That for and in consideration of Two thousand Dollars, and purchaser's agreement to buy Capitol Stock of the Federal Land Bank of New Orleans in an amount of Forty-five dollars, Four hundred dollars of which amounts has been paid in cash, the receipt whereof is hereby acknowledged, and One thousand six hundred forty five dollars of which representing the deferred balance, is evidenced by 2 amortization notes * *

"Would it be proper to charge a filing tax on the sum of \$2,000.00 or on the sum of \$2045.00?"

I am of the opinion that a mortgage tax should be collected on the basis of \$1645.00 and that a deed tax should be collected on the basis of the difference between \$1645.00 and the value of the property. While the instrument indicates that the property is not worth over \$2045.00, nevertheless the value may be greater than this amount.

The rule to be followed is laid down by the Court of Appeals in the case of **Thompson v. Smith**, 174 So. 796, Cert. Den. 174 So. 797 as follows:

"We think there can be no doubt that 'the determination of the amount of tax to be paid on an instrument (offered for recordation) is left to the Probate Judge.' **Long, Judge v. Jasper Land Co.**, 217 Ala. 593, 117 So. 210.

"True, he 'may accept as *prima facie* correct the recitals of the deed (or bill of sale, we interpolate) — — and may act accordingly, *in the absence of any fact or circumstance to the contrary, coming to his attention calculated to put on notice a reasonably prudent person.*' (Italics supplied). **Long, Judge v. Jasper Land Co., supra.**"

I am, therefore, of the opinion that a mortgage tax should be collected on the basis of \$1645.00 and deed tax on the difference between this amount and the value of the property.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Licenses—

Tin shop and roofing shop operator also accepting orders or contracts for work on or in building requiring use of paint, tin, lead, etc. required to secure both tin shop license, under Schedule 110, and contractor's license, under Schedule 42 of Section 348 of Revenue Act of 1935.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 1, 1937, in which you request my opinion as follows:

"The operator of a local tin and roofing shop has paid the license provided for under Schedule No. 110 of the Revenue Act of 1935. It is admitted that this contractor confines his activities exclusively to the roofing and tinning business but that he does make contracts in connection with the operation of this shop.

"The operator of this shop has been cited by the Montgomery County License Inspector for failure to also secure a general contractor's license under Schedule No. 42 of the same act.

"Please advise me as to whether or not both of these licenses are assessable under these circumstances."

In my opinion, an operator of a tin and roofing shop who makes contracts in connection with the operation of such a shop must secure the license imposed upon "any person, firm or corporation accepting orders or contracts" by Schedule 42 of Section 348 of the General Revenue Laws of 1935. This Schedule, insofar as pertinent to your inquiry, provides as follows:

"Any person, firm or corporation accepting orders or contracts for doing any work on or in any building or structure requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, **tin**, lead, electric wiring or other steel, or any other building material * * *, shall be deemed a contractor."

Schedule 42 then proceeds to impose a license on an ascending scale upon every "such contractor".

Your attention is specifically directed to the case of **Hill Grocery Company v. State**, 26 Ala. App. 302, 304, wherein Judge Bricken, speaking for the Court of Appeals, said:

"* * * when a license to do a general business has been exacted and such license paid another license cannot be required and collected for the doing of a part of a particular act, or series of acts, constituting an integral part of such business. Mayor and Alderman of City of Tuscaloosa v. Holzstein, 134 Ala. 636, 32 So. 1007; Gambill v. Endrich Bros., et al., 143 Ala. 506, 39 So. 297; City Council of Montgomery v. Kelly, 142 Ala. 552, 38 So. 67, 70 L.R.A. 209, 110 Am. St. Rep. 43, and cases cited. The general rule above announced is a safe rule of construction of laws imposing occupation taxes or license. **It simply means, in the absence of express words disclosing a different intent, that they were not intended to subject the same business to double taxation or license for the exercise of the same privilege.**" (Emphasis supplied).

The Legislature of Alabama has seen fit to specifically disclose its intention by express words to impose both the contractor's license and the tin shop license on a party operating as is the party operating as detailed in your letter, by the provision found in Section 357 of the 1935 Revenue Laws found on page 447 of Simons' Code, which Section reads as follows:

"Section 357. Wherever in this Act **two or more licenses on the same business** or occupation are required, it is hereby declared to be the intention of the Legislature that all such licenses as are herein levied shall be

"collected without credit or offset, except where specific provision is made therefor."

I therefore advise you that the party operating the tin roofing shop must procure a contractor's license where he accepts contracts for doing work on or in any building or structure requiring the use of paint, tin, lead, etc., as provided by Schedule 42 of the 1935 Revenue Laws. Compare Biennial Report, 1922-24, page 402.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. J. M. Black,
Judge of Probate,
Lowndes County,
Hayneville, Alabama.

Deed conveying half interest in property where grantee does not assume outstanding mortgage or take property subject to same, is subject to tax on one half the value of property conveyed.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I am in receipt of your letter of June 17, 1937, which is as follows:

"There has been presented to this office for record a certain deed conveying one half interest in property worth \$40,000.00. Previous to this the Grantor had executed a mortgage to another party on this same real estate in the amount of \$36,000.00 and when this mortgage was filed for record the proper filing tax was paid thereon. At the present time the mortgage debt of \$36,000.00 has been reduced to \$15,000.00 as shown on face of deed. The deed sets out that the party to whom the property is being conveyed is not to assume any of the remaining \$15,000.00 indebtedness.

"In accepting this deed for record just how would I arrive at the deed tax due on same."

I am of the opinion that this conveyance is subject to tax on the basis of \$20,000.00. Apparently the purchaser is paying \$20,000.00 for the share he is getting, as the instrument states affirmatively that he is not assuming any part of the mortgage, and it does not appear that he is taking it subject to any lien. In the absence of additional facts, therefore, the tax should be upon the basis of \$20,000.00.

However, the law is designed to tax the actual transfer. The actual transaction and not that recited in the instrument is the true test for determining the liability. (See opinion to Judge W. W. Hill, 2nd Quarterly Report, 25, and opinions cited therein). Therefore, you would be authorized to ascertain by inquiry the value of the property conveyed and govern yourself accordingly.

In the absence of facts additional to those set forth by you, I am of the opinion that the tax should be on the basis of \$20,000.00.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Fred F. Dawson,
Member, Board of Revenue,
Limestone County,
Athens, Alabama.

Statutes—

Local Act No. 98 of Legislature 1936-37, p. 53, not unconstitutional for insufficiency of published notice to comply with Section 106 of the Constitution of 1901.

Opinion by Assistant Attorney General Rowe:

Dear Sir:

I have your letter of June 8, 1937, in which you request my opinion as follows:

"By a Local Act of the Legislature, 1936-37, there was passed an Act amending Sections 5 and 22 of an Act 'to create and establish a Board of Revenue in and for Limestone County, Alabama'. The Bill was advertised locally in the county paper as follows:

"Notice is hereby given that there will be introduced at the special or extra ordinary session of the legislature of Alabama, called to convene in November, 1936, a bill to amend Sections 5 and 22 of an act "To create and Establish a Board of Revenue in and for Limestone County, Alabama," approved July 27, 1931. The proposed bill is in substance as follows:

"To provide for the qualification and election of the members of the Board of Revenue of Limestone County to provide for the employment and compensation of a clerk-stenographer for said Board."

"Please advise whether or not this notice is sufficient to comply with Section 106 of the Constitution of 1901 or whether the aforementioned Act is offensive to said Section and therefore void in view of the insufficiency of the notice.

"In particular I desire to call your attention to the Section that the notice above quoted makes no mention of the Section that the election of members of the Board of Revenue is changed from election by county-wide vote to election by districts, this being the entire purpose of the amendment."

In my opinion the Local Act is not unconstitutional because of insufficiency of the published notice of intention to apply therefor required by Section 106 of the Constitution.

The Local Act in question is Act No. 98 of the Special Session of 1936-37. Prior to the passage of this Act the Board of Revenue of Limestone County was regulated by the Local Act of 1931, page 258. Section 5 of that Act provided.

"Section 5. The Chairman and each member of the said Board of Revenue shall be nominated by the voters of the entire County, who are authorized to participate in any primary election, caucus or convention held or called by any political party for the nomination of said offices, and their nomination by the qualified voters of the districts or of any subdivision of said County less than the whole county by any primary election, caucus or convention is hereby prohibited."

As amended by Act No. 98 of the Special Session of 1936-37, this Section now reads:

"Section 5. That from and after the passage of this Act the Chairman of the Board of Revenue shall be nominated and elected by the voters of the entire county who are authorized to participate in any primary election, caucus or convention held or called by any political party for the nomination of said office. There shall be four members of the Board of Revenue, one to be elected from each District, and to qualify as a candidate for member of the Board of Revenue the candidate must be a qualified voter in the District from which he is a candidate. Each member of the Board of Revenue shall be nominated and elected by the voters of the District for which he is a candidate and no voter in the County shall have the right to vote for a candidate for member of the Board of Revenue except those running from the District in which he is a qualified voter."

The effect of this amendatory Act is to change the mode of election of the four members of the Board of Revenue of Limestone County from an election by the County at large to an election from each District. No change is made in the qualifications or election of the Chairman of the Board of Revenue. The qualifications of the members of the Board of Revenue are changed, in that, by the amendatory Act the candidate must be a qualified voter from the District from which he is a candidate. In addition to the qualification and election of the members of the Board of Revenue, the amendatory Act provides that no voter in the county shall have the right to vote for a candidate for member of the Board of Revenue except those running from the District in which he is a qualified voter.

The only change in Section 22 of the Act was to change the provisions as to the salary of the Clerk-Stenographer by leaving out the regulation on such salary of \$90.00 per month under the old Act and providing for a payment of a reasonable compensation fixed by the Board.

In **State vs. Allen** 219 Ala. 590, the Supreme Court said:

"So the substance expressed in a published notice may be broad or narrow and should as a rule extend further in detail than the subject in the title. But with the substance, as with the subject, if it is 'narrow and restrictive', the result is the same when the contents of the enactment materially changes its 'narrow and restrictive' limits. No statement of the substance could be made which would be more narrow and restrictive than an exact copy of the entire proposed act, though it is a compliance with Section 106 of the Constitution (*Jacobs vs. State*, 144 Ala. 98, 40 So. 572). It is said that the purpose of stating the subject in the title is 'to prevent deception by the inclusion in the bill of matters

"'incongruous with the title' (Ex parte Pollard, 40 Ala. 99). and 'while the requirements (of Sections 45 and 106) are not identical, yet their objects are, and their similarity suggests the same general line of reasoning in construing them.' State ex rel. Hanna v. Tunstall, 145 Ala. 477, 481, 40 So. 135, 137.

"To accomplish these objects section 106 of the Constitution requires that the substance of the act must be published in advance. It cannot have the desired effect if the publication states details of substantive features different materially from the act as passed. **If the details are not published but only the general nature of its substantive features, the public is put upon inquiry as to such details, and bound by a failure to inform itself, continuing through such changes and amendments as may stay within such substantive features as published.** But if the publication gives details, the public need not pursue the inquiry further in respect to such details; for the information is complete, and it has the constitutional right to assume that such details will not be materially changed throughout the journey of the bill to its final passage and approval."

Measuring the notice in the instant case by the rule laid down, supra, it is clear that the public was put on notice that it was the intention to amend Sections 5 and 22 of the prior Act of the legislature approved July 27, 1931, "To create and establish a Board of Revenue in and for Limestone County, Alabama."

The notice further apprises the public of the fact that the new legislation will generally deal with the qualifications and election of the members of the Board of Revenue of Limestone County and will deal with the employment and compensation of a clerk-stenographer for the Board. This is a statement of the general substance of the legislation. It is unnecessary to state in the published notice all details of the proposed legislation.

In my judgment, under the rule laid down in the Allen case, supra, the published notice is sufficient to comply with the requirement of Section 106 of the Constitution.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Henry S. Long, President,
State Tax Commission,
Capitol.

Attention: Mr. Harry Simon.

Licenses—

1. Person operating a vending machine for cigarettes who does not sell any other tobacco products and who does not sell cigarettes in any other manner than through said machine, is not required to pay, in addition to the license levied on the privilege of operating such machine by Schedule 154 of the 1935 Revenue Act, as amended by H. B. No. 70, p. 32, Extra Session, 1936-37, the license levied by

Schedule 32 of the 1935 Revenue Act for the privilege of selling tobacco products at retail.

2. Person selling tobacco products generally at retail is liable for the payment of the license levied by Schedule 32 of the 1935 Revenue Act for such privilege, and is not liable for the license levied by Schedule 154, as amended, *supra*, for the privilege of operating a vending machine selling cigarettes, even though he sells cigarettes in such a manner.

3. The maximum license which a municipality can levy on a person operating a cigarette vending machine for the privilege of operating such machine within the municipality is 50% of the license levied for such privilege by the State, under Schedule 154 of the 1935 Revenue Act, as amended, *supra*.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of July 22, 1937, which follows:

"Your opinion is requested as to whether or not a person who operates a nickel-in-the-slot cigarette vending machine would in addition to the license required by Schedule 154, as amended by H. B. 70, Extra Session, 1936-37, State license \$8.00, county license, \$4.00, be required to procure, in addition to such license, a license as provided under Schedule 32, which levies a license on the sale of tobacco products. The person who operates this machine does not sell any other tobacco products than cigarettes and these are sold only through the vending machine.

"Your opinion is also requested as to the maximum license that any municipality can levy on the person operating a nickel-in-the-slot cigarette vending machine for the privilege of operating such machines."

Schedule 154 of the 1935 Revenue Act, as amended by H. B. No. 70, Extra Session, 1936-37, is the schedule levying a license on the privilege of operating a vending machine. This schedule, as amended, reads in pertinent part as follows:

"For each machine for vending gum, candy, cigarettes, music, or on which a person is weighed, or other articles: Where machine is operated by pennies, one (\$1.00) dollar: where machine is operated by nickel or coins of larger denomination, eight (\$8.00) dollars. Provided, that nothing in this schedule shall apply to machine installed by any person, firm, or corporation in its place of business, vending necessary articles on a non-profit basis for emergency use only by the employees of such person, firm, or corporation. Provided, that no license, for said vending machines, vending cigarettes shall be required under this Schedule where the license as provided under Schedule 32 of this Section shall have been obtained by the person operating the place of business in which said vending machine is located, or the owner of said cigarette vending machine shall have secured the license as provided under Schedule 32. Provided further, no municipality shall be allowed to levy and collect a license for the operation of vending machines enumerated and defined in this Schedule in an amount greater than fifty (50%) per cent of that levied by the State."

It will be noted that this schedule exempts a person operating such a machine which vends cigarettes from paying the license levied thereby if he

or the owner of the machine has paid the license levied by Schedule 32 of the 1935 Revenue Act, which is the schedule levying a license on persons for the privilege of selling tobacco products at retail. If all persons who operate cigarette vending machines were required to take out the license levied by Schedule 32, *supra*, whether or not they sold any other tobacco products other than cigarettes, or cigarettes in any other manner than through said machines, then no person operating cigarette vending machines would be liable for the license levied by Schedule 154, as amended, *supra*, on persons for the privilege of operating vending machines selling cigarettes. The provisions of this schedule applying to vending machines selling cigarettes would be without a field of operation, and the legislature would have done a futile and useless thing. There is a presumption that the legislature will not do a futile and useless thing. Wherever possible statutes will be construed so as to give them a field of operation. Bearing these principles of law in mind, and construing the provisions of this schedule applying to vending machines selling cigarettes so as to give them a field of operation, it is my opinion: (1) A person selling cigarettes through a vending machine, who does not sell any other tobacco products, and who does not sell cigarettes in any other manner than through the vending machine, is subject to the license levied by Schedule 154, as amended, *supra*, for the privilege of operating such a machine, and is not liable for the license levied by Schedule 32, *supra*, on persons for the privilege of selling tobacco products at retail. (2) A person who sells tobacco products generally at retail must pay the license levied by Schedule 32, *supra*, for such privilege, and is not required to pay the license levied by Schedule 154, as amended, *supra*, for the privilege of operating a vending machine selling cigarettes, even though he might sell cigarettes in such a manner.

The above quoted provision of Schedule 154, as amended, provides that no municipality shall be allowed to levy and collect a license for the operation of a vending machine enumerated and defined in that schedule in an amount greater than fifty (50) per cent of that levied by the State. Such was within the legislative province. The legislature has the power and authority to prescribe the maximum amount of privilege licenses which municipalities may levy, though it cannot prohibit the municipalities from levying such licenses. By the provisions of Schedule 154, as amended, *supra*, the legislature has exercised this power and authority in regard to the amount of privilege license which a municipality may levy on vending machines. Therefore, a municipality may not levy a license on a person for the privilege of operating vending machines selling cigarettes within the municipality in an amount in excess of 50% of the amount of the license levied by the State for such privilege, which license is levied by Schedule 154, as amended, *supra*.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Alex Brantley,
Judge of Probate,
Pike County,
Troy, Alabama.

Probate Judges—not duty of Probate Judges to ask additional questions of marriage applicants except as specifically set forth in Code section restricting action of Probate Judges.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your request of September 7, 1936, which reads as follows:

“Will you kindly advise me whether or not it is my duty to issue a marriage license when one of the applicants states in his answers to the questions on the printed application that he has been married before, that he has never been divorced? (The form does not have an inquiry as to the death of the former spouse).

“Acts of 1936, pages 215-216, provide that all marriage license forms shall be prepared and furnished by the Bureau of Vital Statistics. The form now furnished contains the following inquiries to be answered by applicant for the license:

“Number of proposed marriage?

“Is Applicant divorced?

“Assuming that applicant answers that the proposed marriage is his second, that he has never been divorced, and no showing is made as to the death of the former spouse, is it the duty of a Judge of Probate to issue a license? I understand that a number of Judges issue marriage licenses under the circumstances above disclosed.”

I am of the opinion that it is your duty to issue a marriage license to applicants under the circumstances detailed by you. The forms authorized under an Act of the Legislature of 1936, (S. 158-Kelley, Governor's No. 179, page 215, of the Act of the 1936 Legislature) which are furnished by the Bureau of Vital Statistics relate to license forms and marriage certificates.

The duty of the Probate Judge in issuing marriage licenses is ministerial, (Cotton v. Rutledge, 33 Ala. 110) and his duty is defined by the Code. The law restricts the Probate Judge in three specific instances: (1) He must not issue a license to a man under twenty-one or a girl under eighteen without consent of parents (Code Section 8999) (2) he must not issue a license unless the male presents a certificate of physical examination (Section 1156); (3) he must not issue a license for a marriage between a white person and a negro (Section 5002). Subject to these restrictions the Probate Judge is required to issue a license and he is not required to pass upon the applicant's eligibility in reference to other qualifications.

To make such a requirement, would place an undue burden on the Probate Judge and would require that he and his clerk be learned in the law, as many legal questions would arise. For instance, if the applicant showed that he had been divorced, the Judge would have to inquire as to the date of the divorce, as persons may not remarry in the State of Alabama within sixty days after a divorce has been granted. If the applicant stated

that a divorce had been granted it would be incumbent upon the Probate Judge to inquire whether or not the divorce was granted to the applicant or to the applicant's former spouse and in the latter case, he must determine whether the applicant had secured the right to remarry, or whether he had secured the divorce in another State. These are but two instances of laws relating to incapacity of persons to marry. There are many other provisions and if the Probate Judge were required to act in a judicial capacity he would have to pass upon all these matters.

It is my opinion therefore, that it is not the intention of the legislature under its present enactments, to require Judges of Probate to make inquiry in reference to the death of the former spouse when an applicant states that he has been married but has not been divorced.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Board of Revenue authorized to pay for safety signal where road crosses railroad. If on State trunk road, signal must be erected in accordance with regulations of State Highway Commission.

Board authorized to pay rent on safety deposit box for County Treasurer.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of July 10, 1937, as follows:

"In a certain county in Alabama the Board of Revenue paid for the construction of a safety signal where a road crossed a railroad.

"Is the Board of Revenue within its authority to pay for this signal?

"Has the Board of Revenue or Commissioners Court authority to pay rent on a safety deposit box for use of the County Treasurer?"

Section 6754 of the 1923 Code of Alabama provides as follows:

"The court (Board of Revenue in this instance) possesses original and unlimited jurisdiction in relation to the establishment, change, or discontinuance of roads, bridges, causeways, ferries, and stock law districts within the county, except where otherwise provided by law, to be exercised in conformity with the provisions of this Code."

This authorizes the Board to construct a safety signal where a road crosses a railroad, unless it is prohibited. I know of no Act of the Code which would prohibit the placing of a safety signal on a public road within the county, even where the road is a State trunk road. Such signal, if on a State controlled highway, would have to conform to the regulations made by the Highway Commission as provided by Section 1397 (46) of Michie's 1928 Code.

I am, therefore, of the opinion that the Board of Revenue would have authority to pay for a safety signal constructed in accordance with these restrictions.

In answer to your second question, the county is required to collect funds from various sources and carry on other fiscal matters. This duty and authority impliedly carries with it the authority to provide a safe place for the care of money, papers and other instruments relating to these matters. I am of the opinion that if, in the judgment of the county board, it is necessary to rent a safety deposit box for the use of the County Treasurer for the deposit of such items, the Board has authority to rent such a box and pay the charges on same.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Roy Johnson, Tax Assessor,
Room 106 Courthouse,
Birmingham, Alabama.

Property owner who voluntarily includes in assessment for ad valorem taxes property previously sold to city at sale to satisfy improvement assessment may not later claim an error in assessment and exemption thereof.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

Reference is made to your letter of inquiry, which I quote as follows:

"The Mortgage Company of New York are the owners by reason of foreclosures, of hundreds of pieces of property in Jefferson County and they have come to me and have made a list of the property which the City had bought in for street improvements prior to the time they made assessments for 1936. They now want to have us lift from their assessment the property bought by the City and they claim exemption on these particular pieces.

"Under a ruling in Vol. 3, page 134, made by you to the Tax Collector of Dallas County it would seem that they are correct in their contentions. However, when the assessment was made they knew then that the property had been bought in by the City and yet they assessed it.

"Will you please advise me, at your earliest possible convenience, whether or not we should lift these items from their 1936 tax return?"

In reply I wish to advise that these items should not be removed from the 1936 tax return. It is my understanding from your letter that the Mortgage Company of New York made their return for ad valorem tax assessment for 1936 and included in said return certain property which had previously been sold to the city for street improvement. No facts are set out in your letter which indicate that the Mortgage Company did not know of this sale to the city at the time they made the return. It has been decided by our Supreme Court that the requirement of the statute that property be

assessed to the owner does not necessarily mean the person with an absolute indefeasible fee simple title, but means the person holding a general and beneficial ownership or an interest of possession and enjoyment. **State v. White Furniture Co.**, 206 Ala. 575, 90 So. 896; **C. F. Crow, Tax Collector v. Outlaw**, 225 Ala. 656, 145 So. 133.

By its voluntary act the Mortgage Company of New York returned this property as being owned by itself and I therefore think that it is a reasonable assumption that they were in possession of the property and enjoying the benefits therefrom.

In the case of **Bains Bros. Ind. Co. v. Purdie**, 180 Ala. 333, at 337, the Supreme Court said:

"Taxes are assessable on October 1st of each year and whoever owns property on that day is the taxable owner and personally liable for the year's taxes. If he should, therefore, convey the property to another he does not thereby escape his personal liability to the state, nor does his grantee *ipso facto* incur a personal liability, although the charges are a charge in rem; but if such grantee voluntarily assessed the property to himself, he thereby assumes and incurs a personal liability for the taxes".

It is therefore my opinion that regardless of whether the property, while owned by the city is exempt from assessment for state and county taxes, the Mortgage Company of New York by their assessment are personally responsible for the taxes and are not entitled to have the assessment removed as an error.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Roy Johnson,
Tax Assessor, Jefferson County,
Room 106 Court House,
Birmingham, Alabama.

Taxation—Property used for purely charitable purposes only one month of tax year not exempt from ad valorem taxes for that year.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter which is as follows:

"Property was leased by the Alabama Transient Bureau from October 1, 1934 to October 1, 1935, which property was exempt from taxation during that time. The manager of the estate owning this property now asks that we exempt same for 1936 taxes because, after the expiration of the lease, the Alabama Transient Bureau occupied the building until some time in November and, immediately after they moved out, the building was razed. They are, therefore, claiming exemption for 1936 because the building was occupied a month and a half in the tax year of 1936."

In answer to your inquiry, I am of the opinion that the property in question is not exempt from the 1936 ad valorem taxes.

The exemption of this property for the 1936 taxes is claimed under the provisions of Section 2 of Act 194, H. 324, approved July 10, 1935, (General Acts 1935, p. 257), which provides in part as follows:

"Section 2. PERSONS AND PROPERTY. The following property and persons shall be exempt from ad valorem taxation and none other: * * * all property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, property, real or personal, owned by any educational, religious or charitable institution, society or corporation, let for rent or hire or for use for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for educational, religious or charitable purposes; * * *".

Under said section the use of the property is the criterion in determining the exemption and not the ownership or the term of the lease.—**Quarterly Report, Vol. III, p. 155; Opinion of Attorney General to Tax Assessor, Jefferson County, September 13, 1935; State et al v. Church of the Advent, 208 Ala. 632, 95 So. 3. The words "used exclusively" in the above quoted statute authorizing the exemption, in my opinion, means that the property must be "used exclusively" throughout the whole of the tax year to come within the exemption. Cf. State v. Alabama Educational Foundation, 231 Ala. 11, h. n. 19. If property is used for charitable purposes only for a portion of the tax year it would not be "used exclusively" for charitable purposes during that tax year. The exemption is not partial or pro rata. Biennial Report Attorney General, 1918-1920, p. 393. This is true although the property is assessed as of October 1st. To hold otherwise would allow a party whose property is vacant to lease same on October 1st for a nominal consideration for purposes purely charitable for a few days, or a few weeks, and thus avoid payment of ad valorem taxes on his property. This, in my judgment, was not the intention of the exemption statute above quoted. Moreover, exemptions must be strictly construed.**

The premises considered, it follows that under the facts set out in your letter, that the property is not exempt from the payment of the 1936 taxes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Henry S. Long, Chairman,
State Tax Commission,
C A P I T O L .

Attention Mr. Nelson, Chief Clerk, Tobacco Tax Department.
License and Taxation—Tobacco Tax.

Privilege tax imposed upon vendor of tobacco products by Section 1, Schedule 159 of Section 348 of the Revenue Act of 1935 is collectible, notwithstanding the fact that such vendor sells and delivers such tobacco products to camp exchange of Civilian Conservation Corps.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"At your earliest convenience, we would appreciate your opinion regarding our insisting that Alabama State Revenue Stamps be affixed to tobacco products being sold and delivered to C. C. C. camps located in the State of Alabama. Civilian Conservation Corps' offices have instructed camps to purchase only tobacco products without Alabama State Revenue Stamps claiming a recent act of the 75th Congress established them as a direct government agency and, therefore, exempts them from paying taxes. They also mention the fact that Alabama is the only State in the union requiring tax on tobacco products sold and delivered to C. C. C. camps."

In my opinion, the wholesale or retail dealer in tobacco tax products who sells the same to a camp exchange of the Civilian Conservation Corps is required to pay the privilege license imposed upon him by Section 1 of Schedule 159 of Section 348 of the Revenue Act of 1935 (Alabama Revenue Laws Annotated, page 414).

Said Act provides in part as follows:

"SECTION 1. That in addition to all other taxes of every kind now imposed by law and which are not specifically repealed by this Chapter, every person, firm corporation, club or association, within the State of Alabama, who sells and/or stores, and/or receives for the purpose of distribution to any person, firm, corporation, club or association within the State of Alabama, cigars, cheroots, stogies, cigarettes, smoking tobacco, chewing tobacco, snuff, or any substitute therefor, either or all, shall pay to the State of Alabama for State purposes only a license or privilege tax which shall be measured by and graduated in accordance with the volume of sales of such person, firm corporation, club or association in Alabama. There is hereby levied license or privilege taxes on articles containing tobacco enumerated in this Chapter the following amounts:" (Here follows the Schedule fixing tax on a graduated basis).

The tax levied by the above quoted section is a privilege license tax upon the vendor of tobacco products. **Exchange Drug Co. v. State Tax Commission**, 218 Ala. 115, h. n. 7.

Section 4 of Public No. 163, H. R. 6551, enacted by the 75th Congress, First Session, provides:

"Sec. 4. There are hereby transferred to the Corps all enrolled personnel, records, papers, property funds, and obligations of the Emergency Conservation Work established under the Act of March 31, 1933 (48 Stat. 22), as amended; and the Corps shall take over the institution of the camp exchange heretofore established and maintained under supervision of the War Department, in connection with and aiding in administration of Civilian Conservation Corps work camps conducted under the authority of said Act as amended: Provided, That such camp exchange shall not sell to persons not connected with the operation of the Civilian Conservation Corps."

The Civilian Conservation Corps indubitably is an agency of the United State Government. The sale of tobacco products to personnel of the Civilian Conservation Corps by a camp exchange may be a commercial rather than a

governmental function. Cf. **Ohio v. Helvering**, 54 S. Ct. 725, 292 U. S. 360, 78 L. Ed. 1307, and cases there cited.

However, inasmuch as the tax imposed by the Alabama Tobacco Tax Act, *supra*, is a privilege tax imposed upon the vendor of tobacco products, the fact that such vendor sells such products to a camp exchange of the Civilian Conservation Corps does not exempt said vendor from the payment of the tax.

No direct burden is imposed upon the United States or any of its agencies. The effect upon an agency of the United States purchasing such tobacco products from a vendor who is taxed by the Alabama Tobacco Tax Act, is incidental and indirect; and the tax is permissible under a long line of decisions of the Supreme Court of the United States. See **Liggett & Myers Tobacco Company v. United States**, and **Commonwealth of Massachusetts v. United States**, 299 U. S. 383, 57 Sup. Ct. 239, 81 Law Ed. 215, and the cases there cited.

I have considered Section 12 of the Alabama Tobacco Tax Act which exempts vendors of tobacco products from payment of the privilege tax levied upon them to the extent that they sell such products to the United States Government for **Army, Navy or Marine purposes**, when such products are shipped or delivered to a place within the state which has lawfully been ceded to the United States Government for Army, Navy or Marine purposes. However, in my opinion, the sale or shipment of such tobacco products to a camp exchange of the Civilian Conservation Corps does not come within the provisions of said Section 12, and the vendor of such products who sells and ships the same to such a camp exchange does not come within the exemptions therein provided.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. S. M. Cobb,
Clerk of the Circuit Court,
Wilcox County,
Camden, Alabama.

1. No costs can be paid from the Fine and Forfeiture Fund in hard labor cases if the defendant has worked out his sentence for full costs.

2. Where a defendant is arrested for a felony and is later convicted of a misdemeanor, the Sheriff's arresting fee is \$4.00, in accordance with the original charge.

3. Sheriffs are entitled to their fees out of the Fine and Forfeiture Fund of the County in juvenile cases, where execution has been returned "no property found", as in other criminal cases.

4. Where costs are taxed against the defendant on a conviction under any conditions, execution must be returned against the defendant "no property found" before it can become a charge against the Fine and Forfeiture Fund of the county.

5. Where the Sheriff is allowed \$3.00 for summoning jury in a capital case, this fee attaches and is allowed each time the case is set down for trial and such jury is summoned.

4. The Sheriff under the law is entitled to \$3.00 for summoning jury in capital case. This is true even though the defendant is on the trial convicted of misdemeanor.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter in which you request my opinion as follows:

"(1). If indicted for a felony and convicted for a misdemeanor can the Sheriff draw \$1.00 from the Fine and Forfeiture Fund of County not paid by the State under Section 3667?

"(2) Can the Sheriff collect from the County \$2.00 for arrest of a felony and for a misdemeanor when only \$2.00 is paid by the State in Hard Labor sentences for a misdemeanor but arrested for a felony?

"I refer you to the Acts of 1927, page 52 as to whether or not the State or County shall pay same under Section 3667.

"(3). Are the Sheriff's and Clerk's entitled to their fees from County or Fine and Forfeiture Fund in Juvenile cases, indicted by the Grand Jury for a felony and transferred by the trial judge of the Circuit Court to the Probate Judge, who is Judge of the Juvenile Court?

"(4). Is the Clerk of the Circuit Court entitled to his fees from the County or Fine and Forfeiture Fund for all fees under the General Law for fees in the Penitentiary and Hard Labor sentences not paid. Section 3667, and if you say that I am entitled to said fees from the County or Fine and Forfeiture fund, not paid, under Section 3667, in all State fail, nol pros. withdrawn, filed and abated by death cases? If so can I charge for the issuance of said executions? Or in other words am I required to issue executions before collecting same?

"(5). Is the State required to pay \$3.00 more than once for summoning jury in capital cases when arraigned more than once and sentenced to Penitentiary, and if not can he collect from the Fine and Forfeiture Fund for summoning juries in Capital cases?

"(6). When indicted for a capital offense and convicted for a misdemeanor and sentenced to Hard Labor for the County is the State required to pay for summoning the jury under Section 3667, or is the County required to pay for summoning said special juries when convicted and sentenced to Hard Labor for the County?"

In answering you request, I am presuming you have reference to cases where the sentence is to hard labor for the full amount of the costs and the convict has worked out the full amount of the costs in his sentence. My answer to your first request is in the negative, that is, if the defendant has been sentenced to hard labor for the costs and his sentence is long enough to pay the costs in full, the working out of his sentence would extinguish the costs. See Biennial Report of Attorney General, 1932-1934, page 436, and Quarterly Report of Attorney General, Vol. II, page 118.

Answering your second request, this office has held that where a defendant is arrested for a felony and is later convicted for a misdemeanor the

arresting fee is \$4.00. Quarterly Report of Attorney General, Vol. I, page 116, and if the defendant has been sentenced to hard labor and served out his sentence only that part paid by the Convict Department can be collected. Biennial Report of Attorney General, 1932-1934, page 436, and Quarterly Report of Attorney General Vol., I, page 118.

Answering your third request, I call your attention to an opinion of this office written to Hon. C. E. Corprew, Sheriff Tallapoosa County, January 10, 1936. Quarterly Report of Attorney General Vol. II, page 28. Here it is held that in Juvenile cases you are entitled to the same fees as in other criminal cases. This being true, whenever the case is disposed of and execution has been returned against the defendant "no property found", the cost should go against the Fine and Forfeiture Fund of the county.

Answering the first part of your fourth request, I call your attention to the fact that I have answered this in my answers to your first and second requests. Answering the second part of your request, my answer is in the affirmative. Execution must issue against the defendant and be returned "no property found" before this charge can go against the Fine and Forfeiture Fund.

Answering your fifth request, it is my opinion you are entitled to collect your fee for each time the case is set down and you are required to summons a special jury. Section 3667 says among other things "summoning jury in capitol cases, \$3.00" but does not say (once).

Answering your sixth request, this office has held that the Sheriff is entitled to \$4.00 for arresting defendant charged with a felony, although he was later convicted of a misdemeanor. Therefore, I am of the opinion you would be entitled to \$3.00 for summoning special jury for the trial of a capital offense, even though the defendant was later convicted of a misdemeanor. You would be entitled to such pay under Section 3667, Code of Alabama 1923 where it says "for summoning jury in capital cases."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. J. H. Williams,
Superintendent of Banks,
State Banking Department,
Capitol.

Subsidiary corporation of bank not permitted to own stock of parent corporation.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter requesting my opinion as follows:

"There is a bank under my supervision which owns all of the stock in a Finance Company which is a corporation authorized by its charter provisions to make loans and to deal in securities. The Finance Company has recently traded for some shares in the bank which owns all of its

"Capital Stock, Section 6355 of the Code prohibits a bank from owning, either directly or indirectly, any of its Capital Stock.

"Your opinion is desired as to whether the bank stock carried in this manner is authorized by law."

I am of the opinion that the Finance Company may not lawfully carry the bank stock under the circumstance detailed by you. The bank controls absolutely the Finance Company and by this control exercises a control over the bank stock owned by the Finance Company. It was the intention of the Legislature that a bank should not be given such control over its issued stock. The bank, by this method, is exercising an indirect control and ownership over this stock.

I therefore advise you that bank stock thus carried is not authorized by law.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. R. E. Brownfield,
Tax Collector, Lee County,
Opelika, Alabama

1. Tax Collector may collect tax on February 1st.
2. Taxpayer giving dishonored check in payment of poll tax has not paid poll tax and is not entitled to credit therefor, nor to have his name on poll list.
3. Tax Collector is not liable for issuing tax receipt to person who gives an uncollectible check in payment thereof.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Will you kindly give me your ruling on the following:

"1. Is it legal for a Tax Collector to sign and issue Poll Tax receipts on February 1st, or is the legal limit midnight January 31st?

"2. Is a Poll Tax receipt valid, and the holder thereof entitled to credit for the payment on the Poll List, when the bank check given in payment for the Poll Tax is not honored by bank upon which it was drawn? And when the Tax Collector makes diligent effort to collect the amount of the dishonored check from the taxpayer but fails, does the Tax Collector have to make good the amount to take care of the Poll Tax receipt, while the fraudulent taxpayer gets credit for having paid?"

In answer to your first inquiry, in my opinion, it is legal for the Tax Collector to sign and issue poll tax receipts on February 1st. Section 208 of the Revenue Code, as construed by this office in Quarterly Reports of the

Attorney General, Vol. I, page 249, Vol. III, page 7. Such receipts may not be issued **after the first day of February**. Section 212 also provides tax collector shall file a list of those who have paid "on or before February 1st." This is clear authority for the tax collector to receive and issue poll tax receipts on February 1st.

You have asked several questions under your second inquiry. Your first inquiry being whether a poll tax receipt is valid and a holder thereof entitled to have his name placed on the poll list when a bank check given by the poll taxpayer is not honored by the bank upon which it is drawn. My answer to this inquiry is in the negative. **Brown v. Leek**, 221 Ala. 319, 128 So. 608:

"Particularly is it necessary to pay money in order to discharge the obligation to pay taxes, and the collecting officer is not authorized to accept any other manner of payment. **Burke v. Armstrong**, 52 Ala. 48 **City of Enterprise v. Rawls**, 204 Ala. 528, 86 So. 374, 11 A. L. R. 1175." Per Foster, J., in **Wadsworth v. State**, 225 Ala. 118, 142 So. 529.

Under these authorities a check is not payment until it is collected from the bank. Under Section 212 above referred to, the poll list must be a list of those who have on or before February 1st **paid** the poll tax. Unless, therefore, the payment is received on or before February 1st, it is not a valid payment and the taxpayers should not be included on the list of those who have paid the poll tax.

Your last inquiry is as to the liability of the tax collector who takes a check in payment of poll tax, issues a tax receipt therefor, and who fails to collect on the check by diligent effort. In my opinion, the Tax Collector is not liable therefor.

Of course, the taxpayer has procured a receipt which purports to show that he has complied with the requirement that he pay his poll tax, but inasmuch as the check which he tendered in payment of such poll tax was uncollectible, he has in fact procured nothing. The Tax Collector ought, in such instances, to make a diligent effort to recover the poll tax receipt from the taxpayer; but whether he is able to recover the receipt or not, he should strike the taxpayer's name from the list of those persons who have paid poll tax in due time, and give notice to the Probate Judge that the name of the taxpayer whose check is uncollectible should not be added to the list in the hands of the Probate Judge.

Of course, Section 207 requires that the Tax Collector account for unused receipts and return the stubs thereof. In the event the collector is unable to recover the poll tax receipt from the person who gave an uncollectible check therefor, he should account for the loss of the receipt by an explanation of the circumstances under which he parted with it.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1937.

Hon. O. L. Andrews,
Clerk, Circuit Court,
Jefferson County,
Birmingham, Alabama.

Costs—County, City and school Districts should not pay their pro rata share of trial tax and library tax in tax appeal suits where costs were taxed against the State.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 26, 1937, which is as follows:

"In prorating the costs, which have been taxed against the State of Alabama in these tax cases, we figured the proration which did not include the \$3.00 trial tax and the \$1.00 library tax. After thinking the matter over, it seems to me that probably the County, the City and the Schools should pay their pro rata share of this \$3.00 tax and \$1.00 tax, and in that case I would probably have to submit additional bills to them."

It is ascertained from other correspondence that the cases in question are tax appeal cases where the costs were taxed against the State.

In answer to your inquiry, it is my opinion that the County, City and School Districts should not pay their pro rata share of the trial tax or the library tax in such cases.

The State is not liable for trial tax.—**Opinion of Attorney General to State Comptroller on May 23, 1935.** Neither is the State liable for the library tax imposed by Acts 1927, p. 261.—**Quarterly Report of Attorney General, Vol. II, p. 47.** Therefore, the two taxes in question are not taxable as part of the cost in the cases under consideration.

The proration provision of costs in tax cases, which you evidently have in mind, is Section 382 of the Revenue Act of 1935, (Acts 1935, p. 569) which is as follows:

"Section 382. Any court costs taxed against the State, shall be paid by the State, and the various taxing subdivisions thereof in proportion to the amount of taxes levied by each. The sworn certificate of the Clerk or Register approved by the State Comptroller shall be authority for the issuance of any payment of warrants therefor by the proper officers of each taxing authority, and shall be treated as a preferred claim."

The proration of the costs under the above quoted provision, in my opinion is applicable to only the costs actually taxed against the State, which would not include the trial tax and library tax in the cases under consideration. Therefore, these two taxes should be disregarded in prorating the costs in accordance with Section 382, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1937.

Hon. Frank M. Johnson,
Judge of Probate,
Winston County,
Double Springs, Alabama.

Budget Act—Compensation for keeping of records provided for in said Act must be paid from General Fund of County and may not be paid from Gasoline Tax Funds.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 16, 1937, in which you request my opinion as follows:

"Under Section 8½ of the County Financial Control Act, approved September 9, 1935 a provision is made for the payment of reasonable compensation for the keeping of the records as specified in said Act.

"I would like to have an opinion from you as to just what funds can the keeping of these records be paid. Can the same be paid from the Gasoline Tax Fund?"

In my opinion the provision for reasonable compensation set forth in Section 8½ of the County Financial Control Act, approved September 9, 1935, authorizes the payment of such compensation for the keeping of the records as specified in said Act from the General Funds of the County. There is no authority in the Act to pay such compensation from the Gasoline Tax Fund. Your attention is directed to opinions of this office in which it is held that the County Financial Control Act does not apply to the Gasoline Tax Fund under its budgeting provisions. (Opinion of the Attorney General, Quarterly Report, Vol. V, pages 32 and 38). You will note that in the opinion to Hon. G. H. Howard, Probate Judge, Elmore County, it was held "from the above provision and from other sections of the Act, it seems clear that the intent of the Legislature was that the Act should apply only to the General Fund as far as its budget provisions are concerned." (Quarterly Report of the Attorney General, Vol. V, pages 38, 39).

It therefore follows quite logically that since the Act does not include the Gasoline Fund under budgeting provisions no payment may be made from the Gasoline Fund to cover the expenses of the operation or of the enforcement of the Act.

Your attention is also directed to the fact that by an Act approved March 4, 1937, (General Acts, Special Session, 1936-37, page 179) the Legislature enacted a law to prevent the use of the revenue derived from the taxes on gasoline, etc., for any purposes other than for the construction, improvement, and maintenance and supervision of highways, bridges, and streets, etc. It cannot be contended that the compensation for keeping the records provided for in Section 8½ of the Budget Act is such an expenditure as is mentioned in the Act found on page 179 of said 1936-37, General Acts.

Your attention is further called to the case of **Weaver v. Tidwell**, 153 So. 218, wherein Chief Justice Anderson speaking for the Supreme Court held that where an Act stated that a certain expense was "to be paid out of the County Treasury" this meant out of the General Funds of the County. This case is quite analogous to the case at hand, and I commend it to you for your attention.

Premises considered it is my opinion that the compensation provided for keeping the record mentioned in Section 8½ of the Budget Act must be paid from the General Fund of the County and the Gasoline Fund may not be expended for this purpose. Nothing said supra, however, must be interpreted to mean that the Probate Judge is entitled to said compensation. (See opinion of Attorney General to Hon. Chas. W. Lee, State Comptroller, under date of May 8, 1937).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1937.

Board of Revenue,
Barbour County,
Eufaula, Alabama.

Counties required to pay for printing of homestead tax exemption forms.

Opinion by Assistant Attorney General Knabe.

Dear Sirs:

I have your letter of June 21, 1937, in which you request my opinion as follows:

"The tax collectors and the tax assessors of Barbour County are calling upon us as Attorneys for the Board of Revenue of Barbour County to advise them relative to the ordering of the necessary blanks required appertaining to the exemption to the taxpayers for the state's part of the ad valorem tax on homesteads. As we understand it, these officials have been directed to secure and have on hand the necessary forms prescribed by the State Officials in connection with having the claim made by the taxpayers for the homestead exemption, which appeared to have been assessed by the assessor, and for which said State's part of the tax the homestead owners have been relieved of by the recent decision of the Supreme Court of Alabama. Inasmuch as the examiner of public accounts in taking up county officers and especially the Board of Revenue, has been very critical as to all charges, we are requesting of your office an opinion as to whether or not the payment for the necessary forms required by the officials in connection with the relief for the assessment for the homestead concession, is a County matter or a State matter. As we understand it, it is purely an exemption for the State's part of the ad valorem tax, and it would appear to us that the State would be liable for this expense in printing these forms.

"In view of the opinion of the Supreme Court in the case of State vs. Tuscaloosa County et al recently decided, wherein the Court holds that the State is responsible for the expense accrued in auditing the accounts of County Superintendents of Education, et al as between County and State, holds that additional moneys are State's funds, it occurs to us that the State would be liable for the expense of preparing these necessary forms.

"Be that as it may, we always are happy to have an opinion of your office relative to such matters and we would be very glad indeed if you would render us an opinion as County Attorneys as to whether these forms, now required necessary, are to be paid by the State of Alabama or the County of Barbour."

I am of the opinion that the homestead assessment forms to which you refer should be paid for by the County. Section 27 of the 1935 Revenue Act (1935 Acts, page 256, at page 274) provides that it is the duty of the Assessor to have assessment blank forms printed at the expense of the County, and Section 28 of said Act provides:

"Section 28. It shall be the duty of the courts of county commissioners or boards of revenue of the several counties in this State to supply the Tax Assessor, Tax Collector and such other tax officials or agents whose duty it is to assess and value property for taxation under this Article, with **all necessary books, stationery and printed blanks** for the proper conduct of their several offices." (Underscoring supplied).

I do not feel that the case of *State v. Tuscaloosa County* 172 So. 892, is applicable. In that case the court held that under a statute which requires a county to pay for an audit made for the county, the county could not be required to pay for the auditing of the accounts of the County Superintendent of Education and County Treasurer of School Funds because such were not examinations for the county.

I am of the opinion that the Sections of the Revenue Code above referred to, make it the duty of the county to supply the homestead tax exemption forms.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1937.

Hon. John S. Pollard,
Tax Assessor,
Dallas County,
Selma, Alabama.

Corporations—Taxation of Shares of Stock.

Value of shares of stock in foreign corporation owned by domestic corporation should not be deducted in arriving at value of shares in domestic corporation.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date which I quote as follows:

"The 'Securities Registration Act' provides that there shall be no ad valorem tax assessed or collected upon any security properly registered and upon which the tax has been paid.

"I wish to know whether an Alabama corporation owning stock in a foreign corporation, which stock has been properly registered and upon which the tax has been paid, is entitled to deduct the value of such stock from the aggregate value of its shares of stock in making its ad valorem assessment under Article 1, Section 13 of the Revenue Act of 1935."

It is my opinion that you are not authorized under Section 13, Article II, Revenue Act of Alabama, Acts of 1935, on page 256, in arriving at the value of the shares of stock in a domestic corporation, to deduct from the value of such shares the value of shares of stock owned by such domestic corporation in a foreign corporation. It is true that Section 344 (d) Article X, Revenue Act of Alabama, provides that no ad valorem taxes shall be assessed or collected upon any foreign security which is registered in Alabama pursuant to the laws of Alabama, but such exemption does not authorize a deduction as above outlined. In the case of *State v. Lovejoy*, 188 Ala. 403, Chief Justice Anderson speaking for the Court said as follows:

"Section 2082 of the Code of 1907, subd. 9, provides for the assessment of every share of stock of any corporation therein embraced, and, while the assessment must be made by the officer of the corporation, and the tax is to be paid by the corporation, it was the manifest purpose of the Legislature to levy the tax on the shares of stock and against the holder thereof, as distinguished from the corporation itself. This section also provides that in arriving at an estimate as to the value of the respective shares so assessed there shall be deducted from the aggregate amount or sum at which the whole of the shares are assessed the aggregate amount or sum at which the real and personal property of the corporation is returned to the tax assessor for taxation, owned by such corporation, and the residue of the value remaining after such deduction shall be the assessed value of the whole of such shares, and such residue, divided by the whole number of shares, shall constitute the value of each share for taxation, and the corporation shall pay for the shareholder the tax assessed against his shares, and the amount so paid for any shareholder shall be a lien on any interest which such shareholder may have in any property owned by the corporation. It is also provided that, if the aggregate value of the shares does not exceed the aggregate value of the real and personal property returned for taxation, then no tax shall be demanded or collected upon the shares.

"The tax is therefore levied against the share, and, though paid by the corporation, must necessarily come out of the shareholder in the end, as the corporation is given a lien on the share for the tax paid thereon and, unless the value of the share exceeds the assessed value of the property returned by the corporation, there can be no assessment or collection against the share. In other words, a liability is fixed against the shareholder and the method of enforcing same is provided.

"It will be noticed that the foregoing deduction is the only one authorized by the statute, except as to fire insurance companies owning Alabama bonds. **Therefore to authorize a deduction from the shares of the value of the property which may be exempt to the corporation, in addition to the value of the real and personal property assessed by it, would be an unwarranted interpolation of the statute, and which seems to have been the action of this court in the case of *Elmwood Cemetery Co. v. Tarrant*, 170 Ala. 549, 54 South, 186. We therefore hold that the only deduction authorized by the statute was the amount for which the property of the corporation was assessed for taxation, and not the**

"value of such property as may have been exempt from taxation in favor of said corporation."

The Court in the foregoing case was construing a section of the Code which is very similar to the law under consideration at the present time. There have been some changes made in Section 2082, of the Code of 1907, subd. 9, but no change has been made authorizing a deduction of exempt property, contrary to the decision from which I quote as above. The Legislature of Alabama saw proper to exempt shares in foreign corporations from the payment of ad valorem tax when such shares are properly registered in Alabama, but it is my opinion that the value of such shares should not be deducted in determining the value of the shares in the domestic corporation.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1937.

Hon. W. A. Lowman,
County Supt. of Education,
Crenshaw County,
Luverne, Alabama.

Schools—Certificate of indebtedness, if validly issued, payable out of proceeds received by County Boards of Education from State bonds, should be paid from that fund.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of a letter of July 23, 1937, from Thompson & Little, Attorneys for County Board of Education of Crenshaw County, which is as follows:

"Please furnish us as attorneys of the Crenshaw County School Board an opinion on the following question:

"In the year of 1932 the following certificate of indebtedness was issued to Mr. Ferrene a teacher in the public schools of Crenshaw County, Alabama; 'Certificate of Indebtedness—Board of Education Crenshaw County, Alabama. State of Alabama, Crenshaw County, Alabama. This is to certify that the Board of Education of Crenshaw County is indebted to Otto W. Ferrene in the amount of \$75.00 for services as a teacher as evidenced by duly executed pay roll for month of March-32. This due bill will be redeemed by regular check of the treasurer of School Funds of Crenshaw County payable to the teacher from available funds when the State Auditor's warrant which he now holds covering duly authorized legislative appropriations shall have been paid by the State Treasurer. Board of Education of Crenshaw County—By N. H. Campbell, Pres., W. L. Segrest, County Treasurer of School Funds. Attest: T. A. Capps, Secretary.'

"The above certificate of indebtedness has been presented to the said County School Board for payment. Now we desire to know whether or not the said certificate is valid, and if so does the County School

"Board have the right to pay same, if so, from what fund is this certificate of indebtedness to be paid?"

In answer to the first inquiry, I am of the opinion that the certificate of indebtedness in question, if validly issued, is valid and should be paid. The certificate on its face indicates it was legally issued and there are no facts presented to us to indicate otherwise.

In answer to the second inquiry, I am of the opinion that said certificate should be paid in the manner set out therein i. e., from the funds received from the State in payment of appropriations out of which the certificate would have been originally payable. In other words, the payment should be made out of the proceeds of the State bonds which were paid to the County Boards of Education to meet the delinquent appropriations of that time. There were sufficient State bonds turned over to the respective County Boards of Education to meet the outstanding obligations payable out of the delinquent appropriations in question. If, by chance, the proceeds derived from the State bonds have been spent, then the fund which received the benefit of any excess from the State bonds should, reimburse the so-called "Bond Fund" in a sufficient amount to meet the outstanding obligations of said Bond Fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1937.

Hon. William A. Conrad,
Deputy Clerk, Circuit Court,
Mobile, Alabama.

If a defendant is convicted of a misdemeanor and the Court fails or refuses to sentence him to as much time as may be required to pay the costs, then in this event, the State is not liable and cannot be required to pay the costs of the prosecution.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 9, 1937, in which you request my opinion as follows:

"In a misdemeanor case where the Circuit Court of Mobile County sentences a defendant to perform hard labor for the County for a given number of days or months **but fails** to sentence the defendant to perform additional hard labor for the County for the costs at the rate of seventy-five cents per day, is the State Convict Department liable for the Costs?"

My answer to the above inquiry is in the negative. It is my opinion that if the court fails or refuses to sentence the defendant for the costs, then the State cannot work him for the payment of same, and not being able to do this, it could not be required to pay for something for which it received no service. See Section 5291, Code of Alabama, 1923.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1937.

Hon. John Brandon,
State Treasurer,
Capitol.

Pensions—Act No. 172, H. B. 260, approved March 1, 1937, imposed upon County Departments of Public Welfare the duty heretofore imposed upon the Probate Judge under Section 2969 Code of Alabama of 1923 relative to the delivery of a Confederate Pension Warrant and the proper endorsement thereon when said pensioner is deceased.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter July 9, 1937, which is as follows:

"Please advise if Section V of an Act No. 172, House Bill No. 260 passed in the last special session of the Legislature transfers the duties of the probate judges of the various counties, as provided in Section 2969 of the Code of Alabama, to the Welfare Department of the State."

In answer to your inquiry, I am of the opinion that the duties imposed upon the Probate Judges under Section 2969, Code of 1923, were transferred to the County Department of Public Welfare by Act No. 172, House Bill 260, approved March 1, 1937. Act No. 172 provided that the State Department of Public Welfare should perform certain duties in regard to Confederate pensions. Section 5 of said Act provides as follows:

"Section 5. It is not the purpose or intent of this Act to deprive the Probate Judge of any duties now imposed upon him by law in connection with Confederate Pensioners other than to relieve him of the duty of receiving and delivering the pension warrants issued by the State Department of Public Welfare. All of the duties heretofore vested in the Probate Judge in connection with the receipt and delivery of pension warrants, are, however, imposed by this Act upon the County Department of Public Welfare."

From the above it appears that the duties of the Probate Judge in regard to receiving and delivering pension warrants were transferred to the County Department of Public Welfare. This was the only duty in respect to Confederate Pension Warrants which was taken away from the Probate Judges.

The inquiry presents itself as to whether or not the duties required of Probate Judges under Section 2969, Code of 1923 is such a receiving or delivering of pension warrants as has been taken away from the Probate Judges and transferred to the Departments of Public Welfare. In my judgment this inquiry should be answered in the affirmative. Section 2969, Code of 1923, provides as follows:

"2969. On death of pensioner delivery of next quarterly payment.—Should a pensioner die leaving a widow who would be entitled to a pension under the provisions of this article, or if there be no widow, leaving a minor child or children, or should a widow die leaving a minor child or children, the probate judge shall deliver the warrant of the next quarterly issue, succeeding the death of said pensioner, to the widow, or if there be no widow, to the minor child or children, of such pensioner, and should there be no widow or minor child of such deceased

pensioner, the probate judge shall endorse such fact on the pension warrant and collect the same and apply the proceeds, first to the payment of the burial expenses, and second, to the expenses of the last illness of the pensioner, attaching thereto a receipt or statement of payment of such expenses."

The duties heretofore required under this section of the Probate Judges are incident to the receiving and delivering of the pension warrants. The making of the endorsement when the pensioner is dead, is incident to the duty of receiving and disbursing said warrants. This duty now should be performed by the County Departments of Public Welfare under the provisions of Section 5 of Act No. 172, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 18, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Attention: Mr. Shaffer.

County Commissioners without authority to send tractor drivers to a school that trains them in tractor operation and mechanics.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry as follows:

"Has a County Board of Revenue the legal right to send tractor drivers to a school in tractor operation and mechanics and pay their expenses?"

I presume that you refer to the general laws of Alabama and not to any special or local law which may authorize a Board of Revenue or the County Commissioners to send a tractor driver to a school and pay his expenses. If I am correct in assuming that you refer to the general laws of Alabama, then I must answer your inquiry in the negative. I can find no general law in Alabama which authorizes a Board of Revenue or the County Commissioners to send tractor drivers to a school and pay their expenses as stated in your inquiry.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 19, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

1. State Board of Adjustment has no jurisdiction over claim filed against State seeking payment of funds appropriated by the Legislature in a relief bill, said bill being Act No. 418, Local Acts of 1931, page 193, approved July 17, 1931, and State Comptroller has no authority to pay an award of the Board of Adjustment for the same.

2. Comptroller held to have authority to pay the amount appropriated by said Act pursuant to the authority contained in said Act out of any funds in the State Treasury not otherwise appropriated.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 15, 1937, which reads as follows:

"On July 17, 1931, House Bill No. 418, Local Acts 1931, page 193 was approved by the Governor. This Act was for relief of Fred Folsom, former Tax Collector of Coffee County and appropriated \$338.61. Mr. Folsom failed to collect this amount during the administration of Governor Miller and he has now filed a claim with the Board of Adjustment. Said Board has made an award of \$338.61 in favor of said claimant.

"Please advise me if the Board of Adjustment had authority to consider this claim in view of the fact that said claimant failed to take advantage of the law in getting this sum of money paid during the former administration. Under the Budget Act one year's money cannot be used to pay another year's claim.

"Please advise me if I have authority to pay this amount out of this year's appropriation, also whether or not the Board of Adjustment has authority to consider a claim of this character."

This office has heretofore, on May 8, 1936, in opinion to Hon. Chas. E. McCall, State Auditor, Capitol, held Act No. 418, Local Acts 1931, page 193, approved July 17, 1931, constitutional and valid and advised therein that the monies thereby appropriated to the beneficiary therein named should be paid over to him, if and when available funds are in the treasury for the payment of the same.

This opinion is found in Volume III, Quarterly Report of the Attorney General, page 101.

As to whether or not the State Board of Adjustment had jurisdiction to hear and consider this claim and make an award for the payment of the same, I advise you now, just as I advised the Board at the time this matter was before them for consideration, that, in my opinion, the said Board had no jurisdiction to hear or consider this claim and that the award made by it for the payment of the same is null and void and of no effect. The State Board of Adjustment was created by an Act of the Legislature No. 564, General Acts 1935, page 1164, approved September 14, 1935. This body was established for the purpose of hearing, considering and acting upon, in the Legislature's stead, relief bills and claims in the nature of

relief bills which the Legislature had theretofore been burdened with acting upon itself, and the Board was clothed by the Act which created it with the necessary authority to so function. The Board acts in these matters for the Legislature and in its stead, pursuant to the authority granted them by the Legislature, and determines, (1) whether or not a person has a claim against the State which should be paid, (2) if so, how much he should be paid and (3) out of what funds he should be paid. In the particular case of the claim of Mr. Folsom, the former Tax Collector of Coffee County, there was no possible field of operation in which the State Board of Adjustment could function. The Legislature had, prior to the time it created the Board, by Act No. 418, supra, itself determined all of the things in connection with this claim which the Board of Adjustment was given the authority to determine as to such claims generally, that is, the Legislature had by the said Act found that Mr. Folsom had a claim against the State which should be paid, determined the amount to which he was entitled, and provided the source from which the same should be paid. The Legislature having so acted, there was nothing whatever which the Board of Adjustment had the power and authority to do in regard to this claim. Therefore, the award made by the Board of Adjustment for the payment of this claim was null and void and of no effect and you have no authority to pay the same. It is a well settled principle of law that a void award for the payment of monies does not justify nor require the official charged with the payment of the same in making payment pursuant thereto.

As to whether or not you have the authority to pay this amount out of this year's appropriation, pursuant, not to the award of the Board of Adjustment, but pursuant to Act No. 418, supra, I advise you that, in my opinion, you have the authority to pay this amount out of the funds in the State Treasury, as soon as there are in the treasury available funds from which to pay the same, after all current appropriations out of said funds have been paid. This holding is in accordance with the holding of the opinion to Judge McCall, supra, and in accordance with the holding of the Supreme Court of Alabama in the very recent case of **Southern Industrial Institute v. Chas. W. Lee, Comptroller, State of Alabama**, 3rd Div. 218 (MS). In accordance with the principles of law announced by the Supreme Court in that case, it is my opinion that the appropriation made by Act No. 418, supra, was not repealed by Section 10 of the Budget Act and is still in full force and effect and should be paid as soon as there are funds available in the State Treasury for the payment of the same.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 19, 1937.

Board of Revenue,
Barbour County,
Eufaula, Alabama.

Section 269 of School Code of 1927—Expenses of three mill tax election—Officers entitled to same pay as entitled under general election laws.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of July 3, 1937, in which you request my opinion as follows:

"A 'three mill tax' election for the Eufaula School District was recently held in Barbour County in all respects as provided by Sections 261-292 inclusive of the School Code of 1927.

"The election of course carried, and the Board of Revenue of Barbour County by the authority of Section 269 of the School Code of 1927, paid the expenses incurred as provided for under the general election law.

"An examiner of accounts recently checked up the Board of Revenue, and charged back a part of the payment, and as we understand his criticism to it was by an Attorney General's Opinion of 1918-1920, page 196. We are of the opinion that Section 269 of the School Code of 1927 governs. Please advise."

Section 269 of the School Code of 1927 provides as follows:

"The officers, including the sheriff, shall perform the same duties, and receive the same pay as provided for under the general election laws aforesaid and all costs and fees of said election shall be paid out of the county treasury."

This section is express authority for the Board of Revenue to pay the costs and fees provided under the general election law.

You do not advise in your letter what fees or costs which were paid by the Board of Revenue were charged back by the Examiner of Accounts. The opinion in Biennial Report of Attorney General 1918-1920, page 196 holds that there is no statutory authority for fees by the sheriff for serving notices upon inspectors of elections under Code Section 348. This holding is not changed by Section 269 of the School Code, since such Section only authorizes the County Board to pay such fees and charges as are authorized by the general election law.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 21, 1937.

Hon. S. L. Johnson,
Clerk & Register of Circuit Court of Calhoun County,
Anniston, Alabama.

Jurors—Person summoned for jury duty in county from which he has removed, is entitled to mileage to and from his new permanent home, if in Alabama.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of July 28 as follows:

"Reference is hereby made to Page 91, Vol. V. Report of the Attorney General, quarter ending Dec. 31st, 1936, and to the opinion given to Hon. John R. Matthews, Clerk of the Circuit Court of Montgomery County.

"Your opinion is very clear to me on the point raised by Mr. Matthews, but I would like to have your opinion on another point of almost the same matter.

"A juror summoned for jury duty in Calhoun County to serve on petit jury, reported for duty when called and informed the Court that he was now living at Fort Payne in DeKalb County, Alabama, that he had made that his permanent home. The Court ordered that he was disqualified and excused. Please advise how his mileage shall be paid. Does he draw mileage to and from Fort Payne, Alabama, or to and from his original residence in Calhoun County?

"Further if such a juror should remove to more than a hundred miles and should receive a summons to serve as a juror, and responded, how should his mileage be paid, or reckoned?"

I am of the opinion that the person whom you mentioned is entitled to mileage from Fort Payne in DeKalb County to and from Anniston, Alabama. When the name of a person is placed in a jury box, he is subject to being summoned for jury duty. In this case he was so summoned and while he might have been challenged by either party on the ground that he had not been a resident householder or freeholder of the county for the last preceding year (Section 8610 of the 1923 Code of Alabama, paragraph 1), nevertheless, if the objection had not been raised, his serving as a juror would have been valid. *Herndon v. State*, 56 So. 85, 2 Ala. App. 118.

When a person is duly summoned as a juror, it is not within his discretion to attend or to decide that it is not necessary for him to attend. If he is living in Alabama he is subject to and amenable to the processes of the court, and upon receiving his summons he should appear before the court, which passes upon his qualifications. In the instant case, the juror having been summoned and having appeared before court, and the court having determined that he is not qualified, the juror is entitled to 5c for each mile travel in going to and returning from court, as provided by Section 3760 of the Alabama Code of 1923.

If such a juror should remove more than a hundred miles, his mileage would be figured by the route usually traveled.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 21, 1937.

Hon. Gaston Scott,
President, Alabama State Bridge Corp.,
Capitol.

National Guard—

1. Not "Troops of the United States" when going to or returning from camps of instruction, although transportation is payable from Federal funds.

2. Troops and vehicles subject to usual toll charges for passage over bridges of Alabama State Bridge Corporation.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"The Alabama State Bridge Corporation has been requested by the National Guard of several States, whose units have paid tolls, to return the amounts paid for the passage over the toll bridges of the Alabama State Bridge Corporation for their men and equipment comprising their units enroute to National Guard encampments.

"The Bridge Corporation has taken the position that the said units were subject to the payment of tolls on the ground that they were not United States troops but were merely military units of the several states and therefore subject to the payment of tolls as such.

"Herewith enclosed file on the matter and a request from the Military Department of the State of Florida for reimbursement. Please return this file when you are through with same.

"The Alabama State Bridge Corporation requests that you advise whether it should make reimbursements to the National Guard units of the several states."

There is attached to your request a letter from the U. S. P. & D. Officer, Florida National Guard, as follows:

"1. During the month of August 1936, this office issued you United States Treasury Check in the amount of \$42.25 for tolls charged to members of the Florida National Guard passing over your bridge. This disbursement was made on my Voucher 399, for the month of August, 1936, and this voucher has been suspended by the General Accounting Office, Washington, D. C., subject to the following remarks:

"The United States is not required to pay tolls for the movement of its mails, troops and munitions of war over bridges constructed under authority of congress pursuant to the General Bridge Act of March 23, 1906, 34 Statute 84 or acts of like import. See 16 Comp. Gen. 427."

"2. Under the circumstances, it is requested that refund be made to this office in the amount of \$42.25, so that I can redeposit it to the credit of the Treasurer of the United States."

In my opinion, the Alabama State Bridge Corporation should not reimburse the National Guard of the several states for the tolls paid on account

of passage of National Guard personnel and vehicles over the bridges of the corporation.

The Act of Congress authorizing the Alabama State Bridge Corporation to erect and maintain certain toll bridges over navigable waters in Alabama (Public No. 526, 75th Congress H. R. 13481) provides in part:

"* * * all of said bridges shall be located at points suitable to the interests of navigation and shall be constructed in accordance with the provisions of the Act entitled 'An Act to regulate the construction of bridges over navigable waters,' approved March 23, 1906, and subject to the conditions and limitations contained in this Act."

The Act of 1906 (34 Statutes 84 C. 1130) referred to in the Act, supra, provides, in part, as follows:

"Sec. 2. That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over any railroad, street railway, or public highway leading to said bridge; and the United States shall have the right to construct, maintain, and repair, without any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies."

Prermitting a consideration of the toll charged to National Guard personnel and vehicles as compared to the "rate per mile paid for transportation over any railroad, street railway or public highway leading to said bridge," the solution of the question depends upon whether such National Guard personnel are "troops of the United States" within the meaning of the Federal statutes.

For the purposes of this opinion, I assume that at the time of the passage over bridges of the corporation, for which toll was charged, the National Guard personnel and vehicles were engaged in going to and coming from a camp of instruction or a maneuver which had been duly ordered by the Governor of the State in which said units are located and approved by the National Guard Bureau of the United States; that the costs of transportation were payable from Federal funds, and that the National Guard units to which the troops and vehicles were assigned had been "Federally recognized."

Even so, such National Guard personnel are not "troops of the United States," and the vehicles assigned to them are not "munitions of war of the United States" within the exemption provisions of the act, supra.

Section 4(a), Title 32, U. S. C. A. (49 Statutes 391 C. 277, Section 2, Approved June 19, 1935) provides:

"National Guard of the United States; establishment; composition .

"The National Guard of the United States is hereby established. It shall be a reserve component of the Army of the United States and shall consist of those federally recognized National Guard units, and organizations, and of the officers, warrant officers, and enlisted members of the National Guard of the several States, Territories, and the District of Columbia, who shall have been appointed, enlisted and ap-

"pointed, or enlisted, as the case may be, in the National Guard of the United States, as hereinafter provided, and of such other officers and warrant officers as may be appointed therein as provided in section 81 of this title: PROVIDED, That the members of the National Guard of the United States shall not be in the active service of the United States except when ordered thereto in accordance with law, and, in time of peace, they shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States, Territories, and the District of Columbia, as provided in this title: AND PROVIDED FURTHER, That under such regulations as the Secretary of War shall prescribe, noncommissioned officers, first class privates, and enlisted specialists of the National Guard may be appointed in corresponding grades, rating, and branches of the National Guard of the United States, without vacating their respective grades and ratings in the National Guard: AND PROVIDING FURTHER, That in the grades of first lieutenant and second lieutenant the number shall be unlimited."

Section 4(b), Title 32, U. S. C. A. (48 Statutes 155, C. 87, Section 4, Approved June 15, 1933) provides:

"'National Guard' and 'National Guard of the United States' defined

"In this title, unless the context or subject matter otherwise requires—

"(a) 'National Guard' or 'National Guard of the several States, Territories, and the District of Columbia' means that portion of the Organized Militia of the several States, Territories, and the District of Columbia, active and inactive, federally recognized as provided in this Act and organized, armed, and equipped in whole or in part at Federal expense and officered and trained under paragraph 16, section 8, article I of the Constitution.

"(b) 'National Guard of the United States' means a reserve component of the Army of the United States composed of those federally recognized units and organizations and persons duly appointed and commissioned in the active and inactive National Guard of the several States, Territories, and the District of Columbia, who have taken and subscribed to the oath of office prescribed in section 112 of this title, and who have been duly appointed by the President in the National Guard of the United States, as provided in this title, and of those officers and warrant officers appointed as prescribed in sections 81 and 113 of this title, and of those persons duly enlisted in the National Guard of the United States and of the several States, Territories, and the District of Columbia who have taken and subscribed to the oath of enlistment prescribed in section 123 of this title."

In Oregon-Washington Railroad and Navigation Company vs. United States, 60 Ct. Cl. 458, the Court of Claims of the United States had under consideration the question of whether transportation by the railroad company of the National Guard troops of the states of Oregon and Washington to and from camps of instruction ordered by the Secretary of War of the United States, which said transportation was payable from Federal funds, was transportation of "troops of the United States" within the reduced fare provisions of the Railroad Land Grant Acts.

Judge Hay, speaking for the Court, said:

"The whole purpose and intent of Congress, as may be seen by a careful study of the national defense act, was to exercise the powers conferred upon it by the Constitution, so that the National Guard should be organized, armed, and disciplined in the same manner as the Regular Army. Congress wanted to make the National Guard an efficient military force, ready for service when called forth under the Constitution, and trained and disciplined for war. Every provision of the act looked to the organizing and training of the militia and to their possible service as United States troops. With that in view it provided for every contingency which might arise or which experience had suggested might be necessary for the most efficient training of these State troops upon which the country would have to rely in large measure in cases of emergency and when it would become necessary to call them forth into the service of the United States.

"With this end in view, Congress provided for the appropriation of money annually for the support of the National Guard, not as United States troops but as State militia; and in providing for this support it specifically included in its arms, ordnance stores, quartermaster stores, camp equipage, all other military supplies, and such other expenses pertaining to the National Guard as are now or may hereafter be authorized by law. By section 67 (39 Stat. 199) and by section 94 of said act (39 Stat. 206) it provided that there may be set aside from the funds appropriated and allotted to any State, Territory or the District of Columbia such portion of said funds as may be necessary for the payment, subsistence, transportation, and other expense of such portion of the National Guard as shall participate in encampments or maneuvers. So that Congress provided by law that the National Guard should be transported to and from these encampments, not as troops in the service of the United States but as the National Guard—the militia—of the States.

"When the National Guard participates in encampments and maneuvers provided for them under the provisions of the national defense act they are not in the service of the United States; they are not called forth for any of the purposes specified in the Constitution; and not being so called forth, they are not troops in the service of the United States. * * * *

"The argument made by the defendant that the oath required to be taken upon enlistment in the National Guard, ipso facto, makes the man taking it a soldier in the service of the United States is not sound.

"The National Guard has a dual character; it is militia in time of peace, and remains so after it is called forth for the purposes specified in the Constitution, but in the latter case is in the service of the United States instead of being in the service of the State, and the oath is prescribed so as to cover their service in both capacities, and also to prevent delay in inducting them into the service of the United States.

"In the instant case we are of the opinion that the National Guard of Oregon and Washington were not troops of the United States when being transported to and from an encampment for purposes of training. The fact that the United States paid for their transportation does not make them troops of the United States, and as they are not troops of the United States they do not come within the meaning of the railroad land-grant acts. *Alabama Great Southern R. R. Co. v. United States*, 49 C. Cls. 522."

See, also *Illinois Central R. R. Co. v. United States*, 60 Ct. Cl. 499. Cf. *Hurley etc. v. United States ex rel Gladman*, 47 Fed. (2) 431; *United States ex rel Gillet v. Dern etc.*, 74 Fed. (2) 485; *State v. Johnson, et al*, 202 N. W. (Wis.) 191; *Spence v. State*, 288 N. Y. Supp. 1009; *Dicicco v. State*, 273 N. Y. Supp. 937.

Although the Federal statutes relative to the composition of the National Guard (39 Stat. 197, 42. Stat. 1075, Title 32 U. S. C. A. Section 4) in effect at the time of the decision of the Court of Claims which is quoted from, *supra*, have been amended materially by the Sections quoted hereinabove, the conclusion of that decision is decisive of the question presented in your inquiry.

My attention has been directed to the decision of the Comptroller General of the U. S., No. A 85116 dated June 21, 1937, addressed to the U. S. P. and D. O. of the Pennsylvania National Guard which holds that vehicles issued to the National Guard of Pennsylvania and assigned to the several units thereof are "munitions of war of the United States" within the meaning of the General Bridges Act of 1906, quoted *supra*.

This decision seems directly to conflict with the reasoning of the Court of Claims in *Oregon-Washington Railroad & Navigation Co. v. U. S.*, *supra*.

Of course, the vehicles remain the property of the United States, but they have been issued to the National Guard of the states. They are not employed in any function connected with troops of the United States. In my opinion, when such vehicles are issued to the National Guard of the several states and are in the possession of and under the control of the several states, they do not come within the exemption of the General Bridges Act, *supra*, as "munitions of war of the United States."

In *U. S. v. Barber*, 9 Cranch 243, 3 L. Ed. 719, and *U. S. v. Sheldon*, 2 Wheat 119, 4 L. Ed. 199, the Supreme Court of the United States held that living fat cattle were "munitions of war" within the meaning of an act of the Congress of July 6, 1812, to prohibit the transportation of naval or military stores, arms, or munitions of war or articles of provisions from the U. S. to Canada.

So that it seems that the use to which property is put is determinative of its status. While property is being used for National Guard purposes by the several states the exemption in the General Bridges Act, *supra*, does not apply to it.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 21, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Statutes—Act No. 252, General Acts, 1923, p. 259, is constitutional.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of July 9, 1937 which is as follows:

"At page 259 of the General Acts of 1923 is an Act of the Legislature approved September 24, 1923.

"Does this Act violate Section 108 or any other Section of the Constitution of Alabama?"

In my opinion, Act No. 252, General Acts, 1923, p. 259, is constitutional. It is as follows:

"Section 1. That hereafter should any costs be collected either by the clerk or sheriff, and there is not enough cost collected to pay the clerk and sheriff in full, the same must be prorated in proportion to the amount due each.

"Section 2. That any clerk of the Circuit, County or other court of like jurisdiction, or sheriff, who violates the provisions of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten nor more than one hundred dollars.

"Section 3. That laws in conflict with Section one of this Act are hereby repealed.

"Approved September 24, 1923."

Section 108 of the Constitution of Alabama, 1901, to which you refer, is as follows:

"The operation of a general law shall not be suspended for the benefit of any individual, private corporation, or association, nor shall any individual, private corporation or association be exempted from the operation of any general law except as in this article otherwise provided."

In my opinion Act No. 256 does not come within the provisions of Section 108 of the Constitution for it does not attempt to suspend a general law for the benefit of an individual or class of individuals.

At common law costs were not recoverable. Therefore, costs can be imposed and recovered only in cases where there is statutory authority therefor. —**Ex Parte Cudd**, 195 Ala. 80, 79 So. 721; **Victor Adding Machine Co. v. Long**, 20 Ala. App. 633, 104 So. 679. The entire matter of costs and fees is subject to legislative enactment, and I know of no Constitutional inhibition against a general law which makes the fees of the clerk and sheriff preferred claims in any case where the entire cost is not collected.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 21, 1937.

Hon. Eugene B. Henry,
Commissioner of Licenses,
117 Court House, Jefferson County,
Birmingham, Alabama

Licenses—Schedule 117 of the 1935 Revenue Act levying a license on radio dealers, held valid.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of March 15, 1937, in which you request an opinion as to the validity of Schedule 117 of the 1935 Revenue Act, which levies a license on radio dealers. Schedule 117 of this Act reads as follows:

"Schedule 117. Every person engaged in the business of selling radios or other receiving or transmitting machines, shall pay the following annual privilege tax: In cities of over fifty thousand (50,000) inhabitants, Twenty-five Dollars; in cities of over fifteen thousand (15,000) inhabitants and not exceeding fifty thousand (50,000) inhabitants, Fifteen Dollars, (\$15.00); in cities and towns of over five thousand (5,000) inhabitants and not exceeding ten thousand (10,000) inhabitants, Ten Dollars (\$10.00); in cities or towns of over one thousand (1,000) inhabitants and not exceeding five thousand (5,000) inhabitants, Five Dollars (\$5.00); in all other places, whether incorporated or not, Three Dollars (\$3.00)."

You will note that this schedule omits any specific mention of dealers in cities or towns with a population ranging from ten to fifteen thousand. However, the last clause in the schedule levies a license of \$3.00 on dealers "in all other places whether incorporated or not."

While the constitution requires equal protection of the laws and uniformity of taxation, it is not violated by the classification of a business on a reasonable basis. 37 C. J. 204; 17 R. C.L. 513. Our Supreme Court has stated:

"Perfect equality is unobtainable and the only limitation on licenses seems to be that it must not be so unreasonable as to show a purpose to prohibit a business which is not in itself injurious to public health or morals. 1 Cooley on Taxation, 3rd Edition, p. 258, et seq.; 2 Cooley on Taxation 3rd Edition, page 1133, et seq."

"While there must be a proper classification, yet that very classification suggests that it is proper to make a distinction between persons engaged in the same business according to the amount of business done and in thus classifying a large discretion must be left to the legislative department. Unless it is unreasonable, arbitrary or oppressive, it will not be interfered with by the Court. **Mayor and Aldermen of Birmingham v. Goldstein**, 151 Ala. 473-477."

It is now definitely decided in Alabama that classification according to the population of different localities is reasonable and constitutional. **Tucker v. State**, 213 Ala. 421, 105 So. 190.

Since the legislature has the authority to make such classification according to population, our remaining question is whether the fact that dealers in cities of from ten to fifteen thousand population, pay a \$3.00 license, while those in towns from five to ten thousand pay \$10.00, makes the license schedule unreasonable and arbitrary. All doubt should be resolved in favor of the

constitutionality of the act and all presumptions indulged in favor of the reasonableness of classification made by the legislature. **Wages v. State**, 141 So. 707; **State v. Gullatt**, 210 Ala. 452, 98 So. 373. Allowing such presumptions in favor of the constitutionality, I am not able to hold that the classification is unreasonable and arbitrary.

In my opinion, therefore, the schedule is valid.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 21, 1937.

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Section 348, 1935 Revenue Act—

Party who has paid maximum contractor's license not liable for further license when accepting contract jointly with another party—such other joint contracting party liable for license.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"1. Joe Downs & Company have secured several contracts in this State during the fiscal year which contracts exceed in the aggregate \$200,000.00, and have presumably paid the maximum license of \$250.00 to the State, but said firm and another person or firm, accepted a contract jointly. Would the parties accepting the contract jointly be subject to the payment of a license, notwithstanding the fact that one of them had already secured the maximum license required for the aggregate amount of contracts accepted by him? Or stated in another manner,

"2. Joe Downs & Company has accepted a contract for \$50,000.00 and procured a license based on the contracts accepted in the brackets of \$50,000.00 to \$100,000.00. Could it under such license accept a joint contract with another party for \$40,000.00 without procuring another license; or would the entity under which the first license was secured be entirely different and require the payment of an additional license computed on the amount of the contract accepted jointly with another?"

You do not give me any facts in your letter as to the other person or firm who accepted the contract jointly with Joe Downs & Company and I am not informed by you whether such other contracting party has paid any contractor's license to the State of Alabama or, if so, in what amount.

Schedule 42 of Section 348 of the 1935 Revenue Law provides that any person, firm or corporation accepting orders or contracts for doing any work etc. must pay a license based upon the gross amount of all orders and contracts. The schedule further provides:

"* * * and when such contractor shall have obtained a license for any year for which he has paid a license tax of **less than the maximum** above prescribed he shall not accept any contract or contracts during such year, the aggregate amount of which exceeds the maximum amount for which his license was obtained, unless and until he shall have paid such additional sum as will make the total license tax paid by him for that year sufficient to cover the aggregate amount of such contract or contracts as prescribed above. * * *" (Emphasis ours).

Under the provisions of this section, a contractor who has paid a license tax of the maximum amount prescribed is entitled to accept any additional amounts of contracts desired and the schedule gives no authority for the collection of an additional license tax from Joe Downs & Company if they have paid maximum license.

The other person or firm who accepts said contract jointly with Joe Downs & Company would be liable for a license based upon total amount of his contracts and the amount of license already taken out. If not sufficiently large such party must take out an additional license as provided by Schedule 42. The mere fact that one of the joint contracting parties has already secured the maximum license required for the aggregate amount of contracts accepted by him would not relieve such other joint contracting party of the obligation upon him individually to secure a license of the proper amount. If both of such contracting parties have paid the maximum license, they would each be entitled to accept contracts in an unlimited amount and would not be liable for an additional license.

The facts set out in your second question are materially in conflict with the facts set out in your first question, in that, in your second question you state that Joe Downs & Company has procured a license based on contracts up to \$100,000.00 while your first question explicitly states that the company has paid a license in the maximum amount. Under the facts set out in your second question if Joe Downs & Company are licensed to accept the contracts up to the amount of \$100,000.00 it would not be liable for an additional license but, as set out above, the party accepting joint contract with Joe Downs & Company would be responsible for license based on the amount of his contracts.

Under your second question you ask whether the entity under which the first license was secured is entirely different from the entity accepting the joint contract. I do not find sufficient facts set out in your letter to pass upon this question. I am unwilling to hold that the mere fact that two licensed contractors accept a contract jointly would constitute them a partnership or such a separate entity that they would be responsible for an additional license where each of them has paid the proper license individually.

Yours very truly,
A. A. CARMICHAEL.
Attorney General.

August 21, 1937.

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Schedule 158.15, Revenue Law of 1935, as amended by Acts 1936, page 208.

Motor vehicles owned by non-resident but kept in state for a period of thirty days and used for commercial purposes subject to registration and payment of registration fees.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 15, 1937, in which you request my opinion as follows:

"Schedule 158.15 is as follows: 'The provisions of the foregoing sections relative to registration and display of registration numbers shall not apply to a motor vehicle owned by a non-resident of this State and not used for hire or used for commercial purposes in this State, for a period of 30 days from date of entering the State, provided that the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory or Federal district of his residence relative to registration of motor vehicles and the display of registration numbers thereon, and shall conspicuously display his registration number as required thereby; provided, further, that nothing herein shall be construed to permit the use of motor vehicles for hire or for commercial purposes by non-residents without complying with the provisions of this Act.' * * *

"A resident of Montgomery making this city and state his home, travels for a firm from Atlanta, and claims the car is owned by Atlanta firm, but Alabama resident keeps possession of car and uses it to travel this state, and in some instances travels in other states. Would not this car require the purchase of Alabama Tag?

"An immediate opinion would be appreciated, as we have a number of residents of Alabama retaining possession of a car, but claim the car is owned by a resident of another state."

Schedule 158.15 of the Revenue Acts of 1935 was construed by this office in opinion reported in Quarterly Reports, Vol. III, page 13, wherein it was held that an automobile owned by a non-resident and not used for hire, was not subject to the Alabama laws relative to registration and display of registration numbers. Thereafter, and by the Acts of 1936, page 208, this Schedule was amended to read as follows:

"The provisions of the foregoing sections relative to registration and display of registration numbers shall not apply to a motor vehicle owned by a non-resident of this State and not used for hire or used for commercial purposes in this State, for a period of 30 days from date of entering the State, provided that the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory or Federal district of his residence relative to registration of motor vehicles and the display of registration numbers thereon, and shall conspicuously display his registration number as required thereby; provided,

further, that nothing herein shall be construed to permit the use of motor vehicles for hire or for commercial purposes by non-residents without complying with the provisions of this Act." * * * (Emphasis supplied)

The schedule, as you will see, was amended by the inclusion of the underlined words "or used for commercial purposes in this State, for a period of 30 days from date of entering the State". The act further provides in the last sentence that "nothing herein shall be construed to permit the use of motor vehicle for hire or the commercial purposes by non-residents without complying with the provisions of this Act."

As I understand the facts set out in your letter, the automobile is kept in the State of Alabama and has been so kept for a period of more than thirty days. It also seems from the facts set out in your letter that the automobile in question is used for commercial purposes. Under this schedule, as amended, the exemption allowed to non-resident owners of motor vehicles is subject to three limitations: (1) The motor vehicle must not be used for hire; (2) The motor vehicle must not be used for commercial purposes and (3) The exemption is only for a period of thirty days from date of entering the State.

In my opinion, the motor vehicle in question does not come within the exemption and is, therefore, subject to the laws requiring purchase of an Alabama registration tag.

Yours very truly,
A. A. CARMICHAEL.
Attorney General.

August 21, 1937.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Licenses—Person doing business in manner outlined in your letter of inquiry, that is, an agent of a company that goes from place to place and takes orders from consumers for merchandise, the delivery to be made two weeks later, the orders being forwarded to the company outside of the State, where they are filled and shipped to Birmingham and from there taken by the agent who took the order and delivered by him to the purchaser, held liable for license under Schedule 146 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Garrett.

I have your letter in which you request my opinion as to the liability for license under Schedule 146 of the 1935 Revenue Act on the following set of facts:

"The agent of a company goes out in the State and takes orders for tea, coffee, spices and other staple groceries. There is no delivery of any goods to the persons making such order at the time of the taking of the order and the agent has no authority to sell anything. He carries a small kit or sample case which contains only a small amount of various

articles. These are in no instance sold. The agent is required to keep this kit intact.

"When orders are taken it is expressly stated that deliveries will be made in two weeks. These orders are then forwarded to the company, outside of the State, where they are filled and shipped by it to itself in Birmingham. Another company there accepts for the company these shipments, which are in car load lots or in very large quantities and takes the cartons containing the various products and puts them in trucks owned by the company and these goods are then delivered to the parties making the orders by the same agent of the company who took the original order.

"The company in Birmingham which received these shipments for the company to whom they belong does not carry in its stock any of these goods. None of these articles are filled at its place of business. All of the goods are delivered from the company's office which is located out of the State. The smaller cartons containing the actual goods are for the purpose of convenience in shipping frequently in a larger carton and this larger carton is broken by the company in Birmingham for proper distribution to the various trucks of the company who owns the same."

It is my opinion that the agent of this company, doing business in the manner outlined above, is liable for license under Schedule 146 of the 1935 Revenue Act, as a transient vendor or peddler.

The license levied by this schedule is on a transient vendor or peddler. A transient vendor or peddler is defined by the schedule as follows:

"(a) All persons commonly and generally termed 'peddlers' and falling within the usual and commonly understood definition of 'peddler', or (b) all persons acting for themselves or as an agent, employee or salesman, or in any capacity for another whether as owner, bailee, or other custodian of goods, wares and merchandise, going from person to person, house to house, or place to place and selling or offering to sell, other than to a retail merchant for resale, goods, wares and merchandise; or (c) All persons who do not keep a regular place of business, open at all times in regular business hours at the same place, going from person to person, house to house, or place to place, or from town to town, and selling or offering for sale, other than to a retail merchant goods, wares and merchandise which they carry with them and who deliver the same at the time of or immediately after the sale; or (d) All persons who go from person to person, house to house, place to place, soliciting orders, other than from a retail merchant for resale, by exhibiting samples, or taking orders and thereafter making "delivery of the goods or filling the order, without carrying or sending the order to the permanent place of business.* * *

To me the decision of the Court of Appeals of Alabama in the case of **Johnston v. State**, 78 So. 419, is conclusive authority to the effect that a person doing business in the manner outlined above is subject to the payment of the license levied by Schedule 146, supra, on a transient vendor or peddler.

The Appellant in the Johnston case, supra, had been convicted of engaging in the business of a peddler without paying the license levied by the Revenue Act of 1915, General Acts of 1915, page 517, Section 1, sub-division 82. I quote at length from the opinion of the court in this case, the opinion being written by Judge Samford:

"The theory of the state was that the defendant's method of selling his wares was an attempted evasion of the revenue laws of the state. The law abhors dodgers, and will not tolerate subterfuges. In passing on this appeal, this court cannot do better than to quote at length the opinion of the learned judge trying the case, which is here quoted and adopted, as follows:

"He is employed by the Jewel Tea Company, a foreign corporation, upon a salary payable to him weekly. That he drives a wagon owned by them. That he makes regular trips and has regular customers. That he visits each place every two weeks. That on each trip he delivers to his customers, if they desire to receive and pay for, the articles for which he did on his previous trip receive a verbal order. That if the customer states to him that he does not desire the goods which had been ordered, he is not bound to take them. That, if the goods are delivered and paid for, he then and there solicits an order for delivery at the next trip. He makes out an order sheet containing the amount of orders received by him and which he sends to his employer at New Orleans, and the goods are shipped to him at Troy, with which to fill those orders so received. As he goes out on a trip he fills his wagon with packages of goods to fill the orders received on his last trip on that route, and, as he goes and delivers, he likewise solicits and receives orders from the same customers; and so on he goes continuously with his regular customers receiving orders and delivering goods all at the same time, but the orders are for delivery on the next trip; and on the next trip taking orders for delivery the trip thereafter follows:

"(1) A 'peddler' is a 'small retail dealer, who carrying his merchandise with him, travels from house to house, exposing his goods for sale and selling them.' *Balou v. State*, 87 Ala. 144, 6 South 393.

"A single act is not sufficient to constitute the offense; if the single act is accompanied with the intent to continue, it may be sufficient.' *Keller v. State*, 123 Ala. 94, 26 South 323.

"(2) 'A person who goes from place to place, soliciting orders by exhibiting samples on condition that the goods are to be delivered to the subscribers by the principal of such salesman, is not a peddler within the meaning of the Code.' *Ballou v. State*, supra.

"A person who goes from place to place carrying samples on his back, selling goods by sample and afterwards sends his orders to his principal, who resides in another state, who forwards the goods to such agent, who then delivers the goods, collects the money, and charges a commission is not subject to license tax imposed upon peddlers.' *Ex parte Murray*, 93 Alabama 87, 8 South, 868.

"(3) I think that it is very evident that the defendant had endeavored to bring his conduct fully within the protection of the foregoing principles of law. I have been unable to find an authority in Alabama where the facts are similar to those here involved; that is to say, where there is a continuous line of customers, visited every two weeks, making deliveries of goods ordered on last trip, and taking orders for the next trip, leaving it optional whether the buyer will take the goods on the next trip. It is very apparent to my mind that it is nothing more nor less than an effort to peddle without license. The whole scheme is for the defendant to sell and deliver his goods from his wagon, and the orders taken each trip for the next trip, with the optional feature to take or not to take with the customer, makes such an order

utterly worthless as a basis of sale. The Buyer obligates himself to do nothing, only giving a semblance of an order, so that when the wagon comes next trip, if the customer wants the goods, he will have a conditional order in for them. I do not think that such a course of dealing is intended to be protected by the courts, or that such a course of dealing is anything more nor less than engaged in the business of peddling without a license. There is no bona fide order for the purchase of goods to be filled, to only made upon condition that the proposed buyer at the next trip desires to make the purchase. I do not think that the law contemplates such a successive routine of work, and visitations of customers. When a machine exhibited by sample, and an order taken, and that order subsequently filled, that ends the transaction, the course of dealing is then stopped, and nothing in the future is contemplated; but here it is not ended and not intended to be ended, but that same proceeding is gone over every week, or every time the customer desires the goods, upon such repeated visits at the stated times. Without further discussion, will say that I think that the defendant is guilty upon his own testimony."

A careful examination fails to disclose where this decision of the Court of Appeals has been overruled or modified. Therefore, it may be said that it is the law in the State of Alabama today.

It may be seen from a reading of the facts furnished me by you and a reading of the facts set out in the opinion in the Johnston case, that the businesses engaged in by the respective parties are in all material respects the same. Therefore, it is my opinion that an agent of the company doing business in the manner outlined in the above statement of facts is liable for the payment of the license levied by Schedule 146 of the 1935 Revenue Act, *supra*.

Yours very truly,
A. A. CARMICHAEL.
Attorney General.

August 21, 1937.

Mrs. M. H. Hurt, Clerk,
Macon County, Board of Revenue
Tuskegee, Alabama

Officers—

1. Member of County governing body (here Chairman of Macon County Board of Revenue) cannot, as agent for a fire insurance company, write fire insurance policies on the property of the county. Section 5024, Code of Alabama, 1923.

2. Member of County governing body, who is the representative of a surety company, may write the bonds for county officials and collect the premiums thereon from the county. Same is not in violation of Section 5024, *supra*.

Opinion by Assistant Attorney General Garrett.

Dear Madam:

I have your letter which follows:

"I have been requested by the Chairman of our Board, the Macon County Board of Revenue, who is a local fire insurance agent, recently appointed by the Board, to obtain your opinion as to whether or not he can continue writing fire insurance policies on the property of the County and surety bonds for County Officials, including probate bonds, and be paid the premiums thereon? You will, of course, bear in mind that he does not solicit nor receive order therefor from the Board, except in the case of fire insurance policies."

The law pertaining to the inquiries propounded in your letter is found in Section 5024 of the Code of Alabama, 1923. This section reads as follows:

"5024. COUNTY OFFICER INTERESTED IN COUNTY CONTRACTS, OR HIRE OF COUNTY CONVICTS.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other State or County officer who takes any for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers."

I do not find a decision from the Appellate Courts of this state construing this section that is pertinent to this inquiry. Compare **Pitts v. Chilton County**, 173 So. 94. This office, in opinions construing Section 5024, has uniformly held that an officer, such as a member of the County governing body, cannot enter into a contract with the county for services, either as principal or agent.

A fire insurance policy written by a fire insurance company on the county property is a contract between the insurance company which writes the same and the county, which contract is made by the agent of the insurance company who writes the policy on the one hand and the County governing body on the other. The representative of the insurance company writing the same is, therefore an agent, entering into contract for service to the county. Consequently, a member of the County governing body of the county, such as the chairman of your Board of Revenue, could not, without violating the provisions of Section 5024, supra, write, as a representative of a fire insurance company, a policy for the county insuring the county property against loss by fire.

The applicable law in Alabama today on the subject of bonds of county officials and the premiums thereon, except in those counties governed by special or local laws, of which your county is not one, is Act No. 290, General Acts, 1932, page 284, approved November 9, 1932. This act, among other things, provides the minimum amount of the bonds of certain officials with the authority in the County governing body to require a bond in a greater amount if it sees fit, while it fixes the amount of the bond of other officials at a definite sum. This act, while providing for the payment of the premiums on official bonds which are made in surety companies, except as otherwise pro-

vided, out of the General Funds of the county, does not vest in the County governing body the authority, power or duty of selecting the surety company to make the bond. That is a matter which is left to the individual officer and he may select any surety company qualified to do business in this state. So, a representative of the bonding company who writes the bond of a county official, such as, for instance, the Judge of Probate, enters into a contract for the surety company, not with the county, but with the individual officer whose bond he writes. The fact that the county is required by law to pay the premium on the bond does not, in my opinion, make this a contract with the county, within the purview of Section 5024, supra. Therefore, a member of the County governing body, such as the Chairman of your Board of Revenue, may write, as the representative of a surety company, the bonds of the various county officers without violating the provisions of Section 5024, supra. Of course, he is interested, as agent, in the contract of surety thus made, but the contract is not a contract between the company writing the bond and the county but rather is a contract between the company and the individual officer whose bond it writes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 21, 1937.

Hon. R. J. Goode,
Commissioner of Agriculture & Industries,
Montgomery, Alabama.

1. Municipalities and counties liable for inspection fees under Section 9, Article 20, Agricultural Code, as amended by Acts 1935, page 45.

2. Such inspection fees may be collected by foreclosing the lien under said section or by civil action therefor.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 17th, in which you request my opinion as follows:

"Your opinion is respectfully requested as to the following:

"1. Is gasoline and other liquid motor fuels subject to the inspection fee when such products are sold to a municipality or county and if so, are municipalities and counties liable for said fees when the company sells said products outside the state of Alabama to a municipality or county and the product is in turn imported into Alabama by said city or county for its use, under Section 9, Article 20, Agricultural Code as amended by Act of the legislature, approved February 5, 1935, being H. 59?

"2. Under the same section, in case municipalities and counties are liable for said fees, would, in your opinion, the most effective and practical method of enforcement be that of asserting a lien upon products upon which said fees have not been paid in the same manner as provided in the case of taxes upon personal property?

"For your information, we beg to state that a few of the cities and counties have denied their liability for these fees upon the ground that the law applies only to 'person, firm or corporation' and does not include cities and counties or that cities and counties not being expressly named are exempt under the rule as to taxation which is stated in 2 Cooley on Taxation, Sec. 621 as follows:

" 'All such property (referring to property of the state and its subdivisions) is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself, and no one would be benefitted but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for public purposes was intended to be excluded, and the law will be administered as excluding it in fact, unless it is unmistakably included in the taxable property by the constitution or a statute.'

"We have been cited the following cases: *State v. City of Montgomery*, 151 So. 856, and *City of Birmingham v. State*, 170 So. 64. These cases referred to taxation, in which the above stated rule would be applicable.

"It is our belief and contention that said cases with reference to the rule as stated by Mr. Cooley would not apply to inspection fees charged for a service rendered under the police powers of the state and for the purpose of paying the expenses of police regulation. The reason for the existence of the rule as to taxation does not exist in the case of inspection fees for regulation purposes. It is as important for the protection of cities and counties and their people who contribute the taxes for the support of said cities and counties that inferior products used by them be regulated and inspected as it is for the individual consumer of such products.

"Inspection fees are not taxes and would not come within the rule of implied exemptions applicable only to taxation based upon the reason that only those employed would be benefitted and going to increase a useless levy. 32 C. J. 935 and cases cited under note 3.

" 'The word "person", like many other words, has no fixed and rigid signification, but has different meanings dependent upon contemporary conditions, the connection in which it is used, and the result to be accomplished'. *Commonwealth v. Welosky*, 177 NE. 656 (Mass). 'Person, firm or corporation' is broad enough to include municipal corporation and whether or not so included 'must be determined by a consideration of the subject matter of the statute, its purpose and effect.' *City of Jackson v. State*, 126 So. 2, 156 Miss. 306; *Peoples v. Deep Rock Oil Corp.*, 175 NE. 572, 343, Ill. 388. In many cases, other than taxation statutes, municipalities and counties have been included within the general wording and statute whenever a reasonable construction of the statute, considering its subject matter, purpose and effect, or the intent of the legislature, make it the reasonable intent.

"It appears from a consideration of the statute under consideration that the legislative intent and the purpose to be accomplished was to prevent the sale of motor fuels in Alabama except those in compliance with the standards adopted or to be adopted and further to prevent the im-

portation into the state any other motor fuels than standard products. See Secs. 2, 4, 5, 10 and 15 of the Act. In no instance does the act contemplate or allow the dealing in within the state or the importation into the state of motor fuels other than standard products subject to inspection. In fact the prevention of the importation of under-standard motor fuels was paramount to the enforcement of the regulation of the quality of the products in the state.

"This is further shown by the fact that the principal change made in the old law, Agricultural Code of 1927, p. 81, by the amendment was the addition of the regulations as applicable to importations of motor fuels into Alabama. **Long v. Poulos**, 174 So. 230.

"Further, Section Section 9 of the Act places the duty of payment first upon the seller for importation into the state or seller within the state, of the latter be the first seller of the product. The fee follows the product if unpaid by the first seller and it becomes the duty of the successor in title to pay said unpaid fees. If the city purchased motor fuel from a dealer within the state or from a refiner or dealer outside the state who had complied with the Act and paid the inspection fees, the city or such dealer, refiner or outside dealer, would not be entitled to have the fees abated to the extent of such sale to the city. **State v. City of Montgomery**, supra; **Orange State Oil Co. v. Amos**, 100 Fla. 884, 130 So. 707. The fees are exacted first of the dealer or refiner selling the products in Alabama or for importation into Alabama. If such fees are not paid by the one first having the duty to pay, the fees are to follow the product and it becomes the duty of the one receiving the same to make such payment or to have the lien asserted upon the product for the payment of the fees.

"Section 10 further confirms this view in that it provides that the Commissioner be advised of the destination of products sold in or for importation into Alabama, in order that he may inspect the same and determine whether or not fees have been paid and if not paid enforce collection.

"Section 17 of the Act expressly provides for exceptions to the Act. Products sold to cities and counties are not included therein. The statute, not being for the levy of a tax on property, nor excise tax, would be subject to the maxim, '*Epressio unius est exclusio alterius*,' rather than to the rule of implied exemptions applied to taxation statutes, in its interpretation. Being an inspection or regulatory act rather than a taxation act, the rigid rule as to exceptions instead of the liberal rule of implied exemptions would seem to apply.

"Therefore, it is our conclusion, upon which your opinion is respectfully sought, that it is the intention of the Act to prevent the sale of motor fuels of understandard quality in the state or for importation into the state regardless of who may be the receiver or consumer and to assess the expenses against those to be benefitted. Further, sales of such products within the state to cities and counties are subject to inspection and the fees against the cities and counties if unpaid by the seller to them, and, if the city or county purchases outside the state for importation into the state and the fees are unpaid by the seller to it, the right to inspect and the fees therefor are not lost by the city or county becoming the receiver or user."

Article 20 of the Agricultural Code of 1927 regulated the sale of gasoline in the State of Alabama and contains certain provisions for the determination of the standard of such motor fuels.

By Act No. 27 (General Acts 1935, p. 45), this Article 20 was amended so as to regulate not only the sale but the importation into the state of such liquid motor fuel. The particular section in question is Section 9 of this amendatory act. The section was amended by including the words "for importation into the state" after the words "offered for sale" in the first sentence of such section. The section then provides:

"It shall be the duty of the person, firm or corporation first selling in **or for importation into** the state gasoline, benzine, naptha or other liquid motor fuels, to pay said inspection fee; provided that if such person, firm or corporation fails to pay said inspection fee the commissioner shall require the payment of said fees from such other persons, firms or corporations as may receive gasoline, benzine, naptha or other liquid motor fuel upon which the inspection fee has not been paid."

This sentence was amended by the inclusion of the words "or for importation into the state".

In my opinion, this act, as amended, shows a clear legislative intent to require the payment of an inspection fee, not only for the sale of gasoline in the state, but to require the payment of the inspection fee by the person, firm or corporation selling gasoline for importation into this state, with the further requirement that if such person selling gasoline or motor fuels for importation into the state fail to pay the inspection fee, such fee must be paid by the person, firm or corporation receiving such motor fuel in the State.

Some question might arise as to the effect of this statute being a burden upon interstate commerce, since as amended it applies to gasoline purchased outside of the state and brought into the state. However, it is now settled by the Supreme Court of the United States that a state is within its governmental powers in requiring inspection of motor fuels, including tests as to quality, as a safeguard in respect to such inflammable substances, when found within the borders of the state or even when moving in commerce from state to state. **Texas Co. v. Brown**, 258 U. S. 466, 66 L. Ed. 721.

I therefore proceed to a consideration of the direct questions asked by you. Your first inquiry is whether such motor fuels are subject to inspection fee when the products are sold to a municipality or county.

It is well settled that a state may, as an incident to its power to enact valid inspection laws, impose a reasonable fee or charge for the purpose of defraying the expenses of inspection and such fee is not a tax. **Texas Co. v. Brown**, 266 Fed. 577; **Texas Co. v. Brown**, 258 U. S. 466, 66 L. Ed. 721; **Louisiana State Board of Health v. Standard Oil Co.**, 107 La. 713, 31 So. 1015; **St. Louis v. Craftman Dairy Co.**, 190 Mo. 492, 1 L. R. A. (N. S.) 636.

The law is well settled in Alabama that while ordinarily a tax levy in general terms does not include municipal corporations, the state may levy an excise tax on gasoline stored by municipal corporations. **City of Birmingham v. State**, 170 So. 64. The reasons for requiring a clear indication of the legislative intention to tax municipal corporations is that the levying of such tax upon municipal corporations would render necessary new taxes to meet the demand of this tax therefore such intention to require the municipalities to

levy a tax to pay a tax should not be imputed. Such reasoning, however, is inapplicable to an inspection fee, as distinguished from a tax.

The entire purpose of the inspection law contained in Article 20 of the Agricultural Code, as amended by the Act of 1935, *supra*, is for the protection of purchasers and other persons coming in contact or liable to be injured by adulterated or impure motor fuels. Such purposes are equally applicable to motor fuels purchased by the city, and where such fee is a reasonable inspection fee, as distinguished from a tax for the purpose of raising revenue, in my opinion the municipality is not exempt from the payment of such fees.

In the case of **People v. Denver**, 84 Col. 576, 272 Pac. 629, the court had presented to it this exact question and it was there held that the city was liable for an inspection fee for the inspection of gasoline used or offered for sale by the city, since the fee was imposed for public protection and not for revenue, and the reasons for inspection fitted the city as much as private individuals. This was the holding of the Colorado court, although the city was not liable to pay a revenue tax imposed on gasoline by another statute; while, as you know, under the decision of **City of Birmingham v. State**, *supra*, such municipalities in Alabama are also liable for revenue tax on gasoline.

Since such a municipality is not exempt from the payment of the inspection fee, in my opinion your second question should also be answered in the affirmative. This second inquiry is whether municipalities and counties are liable for said fees when they purchase the motor fuels outside the State of Alabama and import the motor fuels into the state for their use. Under the provisions of Section 9 of the amendatory act, such inspection fee should be paid by the person, firm or corporation selling such motor fuels for importation into this state, but if not paid by the person selling, it will remain a liability upon the person importing such motor fuels into the state.

Under the decisions above cited, it is my opinion that said municipalities and counties are not exempt from the payment of such reasonable inspection fees, even where the gasoline is purchased out of the state by such municipality or county and imported by it.

Your next inquiry is whether the most effective and practical method of enforcement of the liability for such fees would be that of asserting a lien upon products upon which said fees have not been paid. Said Section 9 provides:

"The inspection fees shall constitute and operate as a lien, at all times until paid, upon any gasoline, benzine, naptha or other liquid motor fuels sold or offered for sale in or imported into this state and shall be enforceable immediately when due, by the commissioner in the same manner as tax liens of the state upon personal property of a delinquent taxpayer are enforceable."

While this method of enforcement is not exclusive, in the ordinary case, it affords a most effective and practical method for the collection of said inspection fees. I call your attention, however, to Code Section 7889:

"All property, real or personal, belonging to the several counties or municipal corporations in this state, and used for county and municipal purposes, shall be exempt from levy and sale under any process, judgment or decree whatsoever"

Therefore, if such motor fuel is to be used for municipal purposes, it is exempt from levy and sale under such lien and other appropriate civil action for the collection of the inspection fees should be adopted.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 21, 1937.

Hon. Frank N. Julian,
Superintendent of Insurance,
Montgomery, Alabama.

Burial Insurance—Where a foreign burial company, although taking application and receiving premiums by mail in another State from a policyholder in Alabama, performs in Alabama the burial service provided by the contract it is "doing business" in Alabama and it and its agents are subject to the applicable statutory penalties.

Opinion by Assistant Attorney General Bibb.

Dear Sir:

I wish to acknowledge receipt of your letter of May 19, in which you asked the following question:

"If a foreign burial company, or association, takes an application in Tennessee, has all premiums transmitted by mail to Tennessee, and if the contract matures, does the performing of the burial service provided under said contract, in Alabama, constitute the doing of business in Alabama, and is the foreign company liable under our laws for doing business in this state?"

While a burial contract usually provides for the furnishing by the company of certain items of merchandise, such contracts provide essentially for the performance of the service of preparing for and performing interments of bodies. Where this usual and customary service is performed in the State of Alabama, pursuant to a contract entered into with a person resident in Alabama, it is my opinion that such action constitutes the doing of business by the company in the State of Alabama.

Boddy v. Continental Inv. Co., 88 So. 294.
Friedlander Bros. v. Deal, 118 So. 508; 218 Ala. 245.
Alabama Western Ry. Co. v. Talley-Bates Const. Co., 162 Ala. 396.
Pepper Mfg. Co. v. Kelly, 198 Ala. 131.

The fact that the Company may have taken the application for the contract and received the premiums therefor by mail out of the State of Alabama would not be material. It therefore follows that if such a foreign corporation performs such service in the State of Alabama without being properly qualified to do business in the State, it and its agents would be subject to the proper statutory penalties therefor.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 23, 1937.

Hon. J. W. Sharpton,
President, Board of Revenue,
Etowah County,
Gadsden, Alabama.

1. Sheriffs of the various counties are entitled to \$5.00 for summoning jury in capital cases.

2. Where the defendant in capital case is convicted and sentenced to the penitentiary, the State under Section 3667, Code of Alabama, 1923, pays \$3.00 of this charge, the county should pay the other \$2.00 from the county treasury.

3. Such claims by the sheriff for services which he indicates here are barred by the statute of limitations of one year. (Section 228, Code of 1923).

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 28, 1937, in which you request my opinion as follows:

"The Sheriff of Etowah County has presented a bill to the Board of Revenue of Etowah County, Alabama for payment. A copy of this account is enclosed herewith:

"You will note that in a number of these cases in which the Sheriff claims a fee there are acquittals and mistrials etc.

"Please examine this account, copy of which I enclose, and give me your opinion on the following questions:

"1. Should the County pay this account?

"2. Should the County pay when the case is continued?

"3. Should the County pay when there is an acquittal of Defendant?

"4. Some of these cases named by the Sheriff are over two years old. Is there a statute of limitation against such claims?"

It is my opinion the Sheriff is entitled to his \$5.00 fee for summoning a jury in capital cases paid by the county under Section 3741, Code of Alabama, 1923, which section fixes the fees and allowances of the sheriffs of the State, "for summoning jury in capital case, or at any special court for the trial of criminal to be paid out of the county treasury...\$5.00." Now, of course, the State under Section 3667, Code of Alabama, 1923, pays \$3.00 of this where the defendant is sentenced and is received in the penitentiary, but this leaves a balance of \$2.00 that should be paid by the county out of the general fund. Now, in all cases where the defendant is acquitted or the case is abated by death or is nolle prossed, the sheriff would be entitled to \$5.00 to be paid out of the county treasury which means the general funds as the State does not pay any fees except on conviction and delivery of a prisoner to the Convict Department. The reason for saying that it is paid out of the general fund, I base this on the holding in the case of **Weaver v. Tidwell**, 153 So. 218.

In answer to your fourth inquiry, it is my opinion that claims not presented within one year are barred by Section 228 of the Code of Alabama of 1923, which is as follows:

"Claims barred if not presented—All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

It is true that the amount of the fee of the sheriff in any particular case is fixed by statute "where the law itself determines the fact and the amount of the claim, leaving nothing to be ascertained or determined by the County Board." Such claims need not be presented as required by statute and are not barred by this section. *State ex rel Mobile v. Board of Commissioners of Mobile County*, 180 Ala. 154. *Caldwell v. Dunkin*, 65 Ala. 461. However, this rule is applicable only where the law itself determines both the fact and the amount of the claim. In the Mobile case cited, the law required the county to pay one-half of the expense of maintaining a pesthouse, but the exact amount could only be determined by the books of the City of Mobile. It was, therefore, held that appropriate claim should have been presented by the City of Mobile and that in the absence of such presentation within the proper time, the claim was barred. Here the law sets the amount in each case . . . \$5.00. But the number of cases and the particular case in which the sheriff is entitled to the fee are undetermined and must be set out in an appropriate claim filed as required by law. In my opinion, therefore, an audit and allowance of the claim are required, and under Section 228 of the Code of Alabama, such claim is barred if not presented for allowance within twelve months after date it accrues or becomes payable.

Yours very truly,

A. A. CARMICHAEL.

Attorney General.

August 23, 1937.

Hon. J. W. Brock,
Clerk & Register, Circuit Court,
Coffee County,
Enterprise, Alabama.

Trial Tax—

Municipalities are liable for trial tax on all cases in which the municipality is a party litigant that go upon the Circuit Court docket, equity or law, except those cases specifically exempt by Section 9 of an Act approved July 17, 1935, (General Acts, 1935, page 256).

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 28, 1937, in which you request my opinion as follows:

"Sometime ago I wrote asking for an opinion as to City paying trial tax in City cases.

"You acknowledged receipt of my letter but, so far have not heard from you concerning same.

"Will appreciate it very much if you will let me hear from you as early as possible as they are wanting to settle some cases."

It is my opinion municipalities are liable for trial taxes in all cases in which they are interested, when costs are taxed against the municipality that go on the docket of the Circuit Court, both Law and Equity, except in such cases as are specifically exempted under Section 9 of an Act approved July 17, 1935, (General Acts, 1935, page 256). The Section I refer to is as follows:

"Section 9. A trial tax of three dollars (\$3.00) be, and the same is hereby imposed in each case civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, and when collected to be paid by the clerk or register of such court as follows: One-half ($\frac{1}{2}$) thereof into the general fund of the State Treasury, and the other one-half ($\frac{1}{2}$) into the general funds of the county in which the same is collected and for collecting and remitting such tax, the clerk or register may retain five per cent (5%) commission thereof. In all counties in this State where the clerk or register is paid on a salary basis under constitutional authority the five per cent (5%) commission provided for by this Act shall not be collected, but such clerk or register shall pay to the State and county respectively each one-half of such trial tax. This trial tax fee shall not, however, be imposed or collected in cases made by any city, or town as a result of the filing by the clerk or other officer of such city or town with the Register of the Circuit Court or like officer of a court of the county having equity jurisdiction, of a list of delinquent taxpayers and property upon which city or town taxes are due as is now or may hereafter be required by law; nor shall said trial tax fee be imposed or collected in any ancillary proceedings, such as garnishment process, resulting from prior proceedings in which said trial tax fee has been imposed, and cases for municipal assessments shall not be subject to such tax, and tax cases."

Although municipalities are not specifically included, it is my opinion that the exemptions set out above clearly indicate the intention of the Legislature to cover municipalities in all cases not specifically exempt. Chief Justice Marshall stated the following rule in **Brown vs. Maryland**, 12 Wheat. 419, and this rule was recently reiterated in **Moore Ice Cream Co. vs. Rose, Collector of Int. Rev.**, 289 U. S. 73, 53 Sup. Ct. Rep. 620;

"An exception of a particular thing from the general words shows that, in the opinion of the lawgiver, the thing excepted would be within the general provision had not the exception been made."

Yours very truly,
A. A. CARMICHAEL.
Attorney General.

August 23, 1937

Hon. Thomas J. Arledge,
Road Supervisor,
Chilton County,
Clanton, Alabama.

Counties—Under facts as stated, Road Supervisor of Chilton County in case of emergency has authority to authorize county road foreman to use their own trucks in doing county work, and to compensate them for the use of the trucks at the same rate as paid persons not employed by the county.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of April 22, 1937, in which you state:

"During the months of January, February, March, 1937, as explained in the attached copy of letter to the Commissioners Court, which is as follows:

'As we only have five county trucks and eight foremen it is necessary that we have other trucks at odd times for handling materials when our trucks are not available to the other foremen. And in order to eliminate the extra costs and delays trying to find available trucks for hire, I have authorized my foremen to use their personally owned vehicles during such periods and pay them at the prevailing rate per hour for the actual time theirs was used, such time not to exceed 3 hours per day and then used only in cases when it was absolutely necessary.'

"I authorized three of my County Road Foremen to use their own personal trucks in emergency work and enter time, for the actual time in use of such trucks, on their payrolls and claims against the County at the regular hourly rate allowed for truck hire. This was done and the Commissioners Court approved and paid such claims for the time made during the months of January and February withholding payment of the claims for March, 1937, as follows:

L. F. Littlefield	42 hours @ .90	\$37.80
J. E. Williams	8 hours @ .90	7.20
B. M. Killingsworth	7 hours @ .90	6.30

"Your advice and opinion is respectfully solicited on the question of the legality of my right to authorize such expenditure in this manner."

You further advise under date of June 24, 1937, as follows:

"In all cases, the Supervisor himself, determined the existence of an emergency and authorized the road foremen to use their own trucks when County trucks were not available."

Answering your question, it is my opinion that when you determined that an emergency existed you had authority to authorize your County Road Foremen to use their own trucks in doing county work, and to compensate them for the use of their trucks at the same rate that you would have had to pay persons who were not employed by the county for the use of their trucks. In other words, you have authority to hire trucks to construct, main-

tain and repair the roads and bridges in Chilton County, and I can see no objection in case of emergency, in your saving time and money for the county by ordering your foremen to use their own trucks instead of delaying the work while you arrange for the hiring of the needed trucks from persons who were not employed by the county.

Section 5 of Act No. 3, H. 3, approved March 10, 1936, (Local Acts 1936, p. 4) provides in part as follows:

"Section 5. That the duty and authority as to the building, maintenance or repairing of public roads and bridges in Chilton County, Alabama, be and the same is hereby vested in said Road Supervisor, subject only to the control of said Commissioners Court of Chilton County, Alabama, as herein set forth. And to that end said Road Supervisor is given the duty, power and authority to employ or hire teams, machines, trucks and all necessary employees, laborers or helpers to properly construct, maintain and repair the roads and bridges of said County. * * *"

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 23, 1937.

Hon. Ernest L. McClure,
Circuit Court Clerk,
Lauderdale County,
Florence, Alabama.

Juries—Jury Box—

1. Jury box should be refilled by Jury Board at the regular meeting of the Jury Board beginning on the first Monday in October of each year, as provided for by the Acts of 1931, page 55.
2. Circuit Judge or judge of court of like jurisdiction may in his discretion call the Jury Board together and empty and refill the jury box of the county whenever he deems it necessary or expedient.
3. Names drawn from jury box should be withheld from the box until the jury box is empty or will probably be empty at the next drawing as provided for by the provisions of the Acts of 1931, page 55, Act No. 47, as amended by the Acts of 1935, page 713, Act No. 288.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your request of recent date as follows:

"Our jury commissioners have for years placed back into the jury box **once each year** the names of all qualified jurors of the County including those drawn and those who served for that particular year preceding. This has been done each year though there have been in each instance an abundance of names of qualified jurors left and remaining in the jury box at the time and immediately before the commissioners

placed back into the box the names of those who had just served during the preceding twelve month period.

"Section 8604 of the 1923 Code provides and seems to indicate conclusively that the commissioners shall refill the jury box and make a new roll only . . . 'whenever the names in the jury box are exhausted, or so far depleted that they will probably be exhausted at the next drawing of jurors...'

"I have read the case of *Steele v. State*, 111 Ala. 32 and it would seem to substantiate this view.

"When the names of those serving during the year are placed back into the box each twelve months, many of them are drawn by chance year after year, and many qualified jurors are left in the box and by chance are not drawn year after year, and simply cannot understand why they are not allowed to serve when others serve year after year.

"Should the cards of those serving be kept out of the box until the names in the box are exhausted or will probably be exhausted at the next drawing."

In my opinion, the matter of refilling the jury box is governed by the provisions of the General Acts of 1931, page 55, Act No. 47, Sections 13, 14, 15, 17 and 18, as affected by the Acts of 1935, page 713, Act No. 288, which amends Section 18 of the Acts of 1931 above referred to. Sections 13, 14, 15 and 16 of the Acts of 1931, provide as follows:

"Section 13. The Jury Board shall meet in the court house at the county seat of the several counties as soon after the approval of this Act as is practicable and thereafter on the first Monday in October in each year, and shall make in a well bound book a roll containing the name of every male citizen living in the county who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the Jury Board shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business of every person selected, and if the residence has a street number it must be given. Upon the completion of the roll the Jury Board shall cause to be prepared plain white cards all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on one card. These cards shall be placed in a substantial metal box provided with a lock and two keys which box shall be kept in a safe or vault in the office of the probate judge and if there be none in that office, the Jury Board shall deposit it in any safe or vault in the court house to be designated on the minutes of the Board, and one of said keys thereof shall be kept by the President of the Jury Board. The other of said keys shall be kept by a judge of a court of record having juries other than the probate or circuit court and in counties having no such court then by the Judge of the circuit court for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept securely and for the use of the Jury Board exclusively. It shall not be inspected by any one except the members of the Board or by the Clerk of the Board, unless under an order of the judge of the Circuit Court, or other court of record having jurisdiction."

Section 14. The Jury Board shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or over sixty-five years of age or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a free holder or householder his name may be placed on the jury roll and in the jury box."

"Section 15. The Jury Board in each of the counties of this state shall meet as soon after the approval of this Act as is practicable and empty the jury boxes in their respective counties and from the new jury roll prepared as herein prescribed refill such jury boxes. Provided however that the provisions of this Section (15) shall not apply to those counties in the State having a population of Three Hundred Thousand (300,000) or more according to the latest Federal Census, and in which the Jury box or boxes have been filled by the jury commission within twelve (12) months preceding the approval of this Bill."

"Section 16. Whenever the names in the jury box are exhausted or so far depleted that they will probably be exhausted at the next drawing of jurors, the Jury Board must proceed to make and certify a new roll and deposit the names in the box in all respects as provided in this Act, and for this purpose the Jury Board must meet whenever it is necessary and refill the jury box."

You will note that Section 13 above quoted requires that a complete roll of the eligible jurors of each county provided for by this Act shall be made up at a meeting of the Jury Board to be held beginning on the first Monday in October of each year. The names of all eligible jurors in the county are required to be placed on cards prepared for that purpose, and placed in a substantial metal box which shall be deposited in a safe or vault in the courthouse, subject to the provisions of the above quoted Act.

Section 14 of the above quoted Act requires that the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment and who are over twenty one years of age and not over sixty five years of age and who are not habitual drunkards or unfit to discharge the duties of the jurors or who cannot read English or who have never been convicted of any offense involving moral turpitude, be placed in the jury box, the one exception to this provision is that if a person cannot read English and has all the other qualifications required he may be placed on the jury roll and in the jury box.

Section 16 quoted above requires that "whenever the names in the jury box are exhausted or so far depleted that they will probably be exhausted at the next drawing of jurors the Jury Board must proceed to make and certify a new roll and deposit the names in the box in all respects as provided in this Act, and for this purpose the Jury Board must meet whenever it is necessary and refill the jury box". However, the provisions of this Act have been amended by the Acts of 1935, page 713, as follows:

"Section 1. That Section 18 of an Act entitled 'An Act to establish Jury Boards in the several counties of this state, to fix the membership

"of said Boards, to prescribe the qualifications and terms of office and provide for the appointment of the members thereof; to fix their compensation and to define their duties; to provide for the appointment, duties and compensation of clerks of said Boards, for the qualifications of jurors, for the preparation of jury rolls and the emptying, filling and refilling of jury boxes; and to provide for the payment of the necessary expenses of the Board. (Approved Feb. 20, 1931)', be and the same is hereby amended to read as follows: Sec. 18. Whenever it shall appear to the Judge of the Circuit Court, or court of like jurisdiction, that the jury box is so nearly exhausted as to require refilling, he shall notify the President of the Jury Board, who in turn shall call together the other members of the Board and shall proceed to refill the box as herein provided; provided, however, the Judge of the Circuit Court, or court of like jurisdiction, may, whenever in his discretion he deems it necessary or expedient, call the jury board together and empty and refill the jury box of the particular county, as herein provided.

"Section 2. That all laws or parts of laws in conflict with the provisions of this Act be and the same are hereby repealed."

"Section 13 of the Acts of 1931 quoted above has the effect in my opinion of requiring that the name of every male citizen possessing qualifications described by the Act to serve as a juror and not exempt by law from jury duty be placed on the jury roll and in the jury box each year.

The premises considered it is my opinion that the matter of refilling the jury box is a matter which addresses itself first of all to the Jury Board who are required, as above pointed out, to refill the jury box each year at the meeting of the Jury Board beginning on the first Monday in October. Secondly, the jury box may be refilled at any time that, in the discretion of the Judge of the Circuit Court or court of like jurisdiction, it may be deemed necessary and expedient. The Judge of the Circuit Court or court of like jurisdiction has the right in his discretion to call the Jury Board together and empty and refill the jury box of the particular county at any time he may deem it necessary or expedient in the reasonable exercise of his discretion. It will be further noted that the Judge of the Circuit Court or court of like jurisdiction is authorized to notify the President of the Jury Board who, in turn, is required to call together the other members of the Board and proceed to refill the box as provided for by the above quoted Acts of 1935, Section 1.

You inquire specifically whether or not the cards of those serving as jurors should be kept out of the box until the names in the box are exhausted or will probably be exhausted at the next drawing. In my judgment, the cards of those serving as jurors should be kept out of the box until the names in the box are exhausted or will probably be exhausted at the next drawing. In my opinion, Section 18 of the Acts of 1931, as amended by the Acts of 1935, both quoted, *supra*, contemplates that the names of the jurors as drawn shall be kept out of the box until the box is empty or in the discretion of the judge will probably be empty at the next drawing. I call your attention to the provision "whenever it shall appear to the Judge of the Circuit Court or court of like jurisdiction that the jury box is so nearly exhausted as to require refilling * * *". In my judgment, if the cards are replaced into the jury box after each drawing there would perhaps never be a time when the jury box would be so nearly exhausted as to require re-

filling. It is my opinion that the intention of the Legislature here is that the names of all eligible persons for jury duty in the county should be placed in the jury box and if drawn kept out of the jury box until the box is so nearly exhausted as to require refilling, according to the provisions of the above quoted Acts of 1931 and 1935.

The refilling of the jury box was, before the passage of this law, a matter that addressed itself to the discretion and judgment of the jury commission. I wish to refer you to the case of *Nelson v. State*, 62 So. 189.

You refer in your request to the case of *Steele v. State*, 111 Ala. 32, and state that in your opinion this case holds that the box cannot be refilled until the same is exhausted, or so far depleted it will probably be exhausted of the next drawing of the jurors. This case in my opinion is clearly not in point at the present time in view of the amended law pointed out supra.

Section 8604 of the Code of 1923 was repealed by the Acts of 1931, supra. I refer you to Section 25, the acts of 1931, page 55, Act No. 47, which provides as follows:

"That all laws, general, local or special in conflict with any of the provisions of this Act be and the same are hereby repealed, it being the intent of the Legislature that the subjects covered by this Act be the exclusive law on such subjects."

Premises considered, it is my judgment and opinion that the Act of 1931, quoted supra, as amended by the Acts of 1935, quoted supra, governs the refilling of jury boxes and the action of jury boards at the present time.

It is further my opinion that jury boxes may be refilled whenever in the discretion and opinion of the Judge of the Circuit Court or court of like jurisdiction, that such action is necessary, in accordance with the provisions of law set out heretofore in this opinion.

Yours very truly,

A. A. CARMICHAEL.

Attorney General.

August 23, 1937.

Hon. H. A. Terry,
Judge of Probate,
Hale County,
Greensboro, Alabama.

1. Premiums on liability insurance on county highway trucks cannot be paid out of gasoline funds.
2. Expenses of repair shop operated by highway construction and maintenance department payable out of gasoline funds.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of March 23, 1937, in which you request my opinion as follows:

"Hale County Highway Department operates a fleet of trucks and carry a blanket liability and personal property damage insurance on this fleet of trucks. These trucks are used exclusively for road, bridge construction and highway maintenances and I would like for you to advise me if this blanket insurance premiums can be paid out of the Gasoline Funds.

"The highway construction and maintenance department also have a shop operated exclusively for the above subject. Kindly advise if the water bill, light bill and other necessary items of expense to the keeping of this shop could be paid from the Gasoline Fund."

In answer to your first question, I am of the opinion that the blanket insurance premiums cannot be paid out of the Gasoline Funds. Under the provision of Schedule 156.9 of the Revenue Act of 1935, gasoline funds shall be expended "exclusively in the construction, maintenance and repair of the public roads and bridges in such county." The liability insurance which is authorized by Code Section 6755 (24) 1936 Supplement to Michie's Code, is for the protection of the general fund of the county. While the trucks are used in the construction and maintenance of the roads, the insurance is for the benefit of the general fund of the county and the premiums thereon in my opinion must be paid out of the general fund of the county. See *Weaver v. Tidwell*, 153 So. 218.

Your second question should be answered in the affirmative. The shops referred to and the expenses of operating such shops are part of the expenses of maintenance and repair of the public roads.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 23, 1937.

Hon. Chas. W. Lee,
State Comptroller,
C A P I T O L .

Elections—

1. Probate Judge held entitled to 2½¢ per name for making list of registered electors of county, a copy of which must be furnished to the Secretary of State, annually, required by Section 187 of the Constitution of Alabama of 1901 and Section 401 of the Code of Alabama, 1923, as provided by Section 7285 of the Code of Alabama, 1923.

2. Probate Judge held permitted to employ clerical assistance to make list of qualified electors which he is required to furnish to election officials for each election legally held in Alabama.

(a) Compensation of "up to five cents per name" for such clerical assistance held authorized, but payment of compensation must be to the clerical assistants and not to the probate judge. Section 402, Code of Alabama, 1923, as amended.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter in which you request my opinion as follows:

"1 Are Probate Judges entitled to 2½c per name for making lists of qualified voters every year or every other year?

"2. For what list of qualified voters may clerical assistants be paid five cents per name? Is it the same list for which the Probate Judge is paid 2½c per name, if not what lists or for what elections may these lists be paid for?

"You are referred to the following:

"Sec. 187 of the Constitution. Section 387, 402, and 7285 of the 1923 Code as amended by Acts of 1927, page 277 and Acts of 1931 page 293. A. G. O. April 1, June 30, 1936, page 109."

In reply, I wish to advise you that, in my opinion, a Judge of Probate is entitled to 2½c per name for making an alphabetical list of the registered electors of the county, a copy of which must be furnished to the Secretary of State, annually, required by Section 187 of the Constitution of Alabama, 1901, and Section 401 of the Code of Alabama, 1923 as provided by Section 7285 of the Code of Alabama, 1923.

Section 187 of the Constitution reads as follows:

"The board of registrars in each county shall, on or before the first day of February, nineteen hundred and three, or as soon thereafter as practicable, file in the office of the judge of probate in their county, a complete list sworn to by them of all persons registered in their county, showing the age of such persons so registered, with the precinct or ward in which each of such persons resides set opposite the name of such persons, and shall also file a like list in the office of the secretary of state. The judge of probate shall, on or before the first day of March, nineteen hundred and three, or as soon thereafter as practicable, cause to be made from such list in duplicate, in the books furnished by the secretary of state, an alphabetical list by precincts of the persons shown by the list of the registrars to have registered in the county, and shall file one of such alphabetical lists in the office of the secretary of state; for which services by the judges of probate compensation shall be provided by the legislature. The judges of probate shall keep both the original list filed by the registrars and the alphabetical list made therefrom as records in the office of the judge of probate of the county. Unless he shall become disqualified under the provisions of this article, any one who shall register prior to the first day of January, nineteen hundred and three, shall remain an elector during life, and shall not be required to register again unless he changes his residence, in which event he may register again on production of his certificate. The certificate of the registrars or of the judge of probate or of the secretary of state shall be sufficient evidence to establish the fact of such life registration. Such certificate shall be issued free of charge to the elector, and the legislature shall provide by law for the renewal of such certificate when lost, mutilated or destroyed."

Section 401 of the Code of Alabama, 1923, provides:

"Section 401. List of names registered by precincts.—The board of registrars shall each year within two weeks after the expiration of the time prescribed for registration, make a copy of the list of names regis-

"tered, stating the residence, color and sex of the persons registered by precincts, if not in an incorporated city or town, or by ward if in an incorporated city or town, which copy, along with the registration list, must be returned to the office of the judge of probate of the county. The judge of probate shall certify an alphabetical list to the secretary of state. The judge of probate shall keep both the original list filed by the registrars and the alphabetical list made therefrom as recorded in the office of the judge of probate of the county, which shall be open to public inspection."

Section 7285 of the Code of 1923, provides in pertinent part as follows:

"For preparing list of registered voters, as required by Section 187 of the Constitution, 2½c a copy for each voter enrolled to be paid by the county commissioners in each county."

It can be readily seen from a reading of the above quoted provisions of law that this list is a list of the registered electors of the county and not a list of the **qualified** electors thereof. The two are entirely separate and distinct. A person on the list of registered electors must have paid all poll tax required by law, unless he is exempt from the payment of the same, before his name can appear on the list of qualified electors, and it is a matter of common knowledge that many persons are registered electors without being **qualified** electors, for the reason that they have not paid all poll tax due by them.

It is this list of registered electors, a copy of which the probate judge must furnish to the Secretary of State, annually, for which he is entitled to 2½c per name for making, and not the list of qualified electors, a copy of which he is required to furnish the election officials in each election legally held in Alabama.

It is the list of **qualified** electors which the probate judge is required to make annually by Section 387, Code of Alabama, 1923, a copy of which he is required to furnish to the election officials in each election legally held, by Section 387 and 388 of the Code of Alabama, 1923, in the making of which he is permitted to employ clerical assistance as provided by Section 402 of the Code of Alabama, 1923, as amended by the Acts of 1927, General Acts, 1927, at page 277, as further amended by the Acts of 1931, General Acts of 1931, at page 293. This code section provides for the payment of compensation of "up to five cents per name" for the clerical assistance employed by the probate judge to assist in the making of this list of qualified electors. The compensation for this assistance must be paid to the clerical assistants themselves and not to the probate judge.

The holding of this office, as announced in numerous previous opinions, is to the effect that payment may be made for clerical assistance in the preparation and furnishing of the list of **qualified** electors each time an election is legally held in Alabama, whether such election be a general, special or a primary election. Of course, you are familiar with the opinion of this office holding that the Judge of Probate may not employ assistance in making and furnishing the list for a second primary when such list has been furnished for the original primary election, since the second primary election is, by the reasoning in said opinion, held to be a part of the original primary election. See Opinion of Attorney General to Hon. I. I. Moses, Russell County, under date of Feb. 12, 1935. This opinion, and all subsequent opinions on this subject, follows the holding of this office over a period of years to the effect that this list must be prepared and furnished to election inspectors in all elections legally held, and that the judge of probate may employ and

pay for clerical assistance in making said list, as provided by Section 402 as amended, *supra*, each time he is required to furnish it. The law requires that these lists be prepared and furnished the election inspectors immediately preceding each election. See opinions of the Attorney General—

Biennial Report, 1922-24, p. 461.

Biennial Report, 1926-1928, pp. 276, 146, 147, 171,

Biennial Report, 1928-1930, p. 642.

You will note that the construction here announced has been placed upon this law by those charged with the duty of interpreting and administering it over a long period of time. Our Supreme Court has held in a number of decisions that when a certain construction has been placed upon a law by those charged with the duty of interpreting and executing the law, such interpretation will not, as a rule, be disturbed and is controlling.

In the case of **State v. Board of School Commissioners of Mobile County**, 183 Ala. 554, 575, Mr. Justice Mayfield sifts this question thoroughly and carefully and states the point in the following clear, direct and forceful language:

"In all cases of ambiguity the contemporaneous construction not only of the courts but of the departments and even of the officials whose duty it is to carry the law into effect is universally held to be controlling."

See also **State v. Tuscaloosa Building & Loan Association**, 230 Ala. 481, 161 So. 530; **Macon County v. Abercrombie**, 184 Ala. 283, 63 So. 985; **State Board of Administration v. Jones**, 212 Ala. 380, 102 So. 626; **Stewart v. Wilson Printing Co.**, 210 Ala. 624, 99 So. 92; **State v. H. M. Hobbie Grocery Co.**, 225 Ala. 151.

Furthermore, this law is not new but has been re-enacted from time to time with only slight changes in 1927 and 1931. The case is, therefore, made much stronger by this fact. In the case of **Barnwall v. Murrell**, 108 Ala. 366, 18 So. 831, the Court held:

"Re-enacted statutes must receive the known, settled construction which they had received when previously of force; for it must be presumed the legislature intended the adoption of that construction, or they would have varied the words, adapting them to a different intent."

The premises considered, it is my opinion that only one construction may be placed upon this law by us here—namely, the Judge of Probate is authorized to employ clerical assistance in preparing the list of **qualified** electors and furnishing the same to the election officials each time a separate election is legally held in Alabama, and that each time the clerical assistance so employed may be paid for in the manner provided by Section 402, as amended, *supra*.

As can be seen from the above, the list of **registered** electors which the probate judge is required to make annually, a copy of which he must furnish to the Secretary of State, by Section 401, *supra*, is the list for which he is entitled to compensation at the rate of 2½c per name. Likewise, it can be seen that this is an entirely different list from the list of **qualified** electors which the probate judge is required to make annually by Section 387, *supra*, a copy of which he is required to furnish to the election officials, by Sections 387 and 388, each time an election is legally held in Alabama. It is the list of qualified electors that he is authorized by Section 402, *supra*, to employ

clerical assistance in making, the compensation for such assistance to be paid in the manner, amount, and at the times hereinabove set forth.

These two lists have previously been confused by this office, and, consequently, some of the opinions concerning the same have been partially laid in error. The opinion to Hon. J. A. Carnley, Probate Judge, Coffee County, Elba, Alabama, under date of May 8, 1936, Quarterly Report of the Attorney General, Volume III, page 109, is hereby modified to conform to the holdings of this opinion. Any and all other opinions of this office not in accord with the views hereinabove expressed are hereby modified to conform hereto.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

August 27, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Alabama Luxury (Sales) Tax Act—

Counties held authorized, and under duty, to reimburse their general fund from the proceeds of the tax levied by said Act for the actual amount expended by them from the general fund for the operation of public health, public welfare, and agricultural extension service agencies or units in their counties since March 1, 1937, at which time the proceeds of the tax levied by the Luxury (Sales) Tax Act began to accrue, when the revenue available in the general fund was not sufficient to pay the involuntary obligations against said fund (that is, obligations of the county, the payment of which out of the general fund is made mandatory by statute) and also for the operation of the above named agencies or units, and the money so advanced from the general fund since March 1, 1937 was expended for this purpose by the county governing body only to keep from paralyzing the operation of these three agencies or units, and with the expectation that the general fund would be reimbursed for this amount when the proceeds of the tax levied by the Luxury (Sales) Tax Act allocated to them were received.

Opinion by the Attorney General.

Dear Sir:

I have your letter of July 23, 1937, which follows:

“The Luxury Tax Law, which became effective March 1, 1937, provides that one-fourth of the net proceeds of same shall be paid to the Counties to be used exclusively for Health, Welfare, and Extension Service.

“This Revenue began to accrue to the Counties on March 1, 1937, but the first distribution to the Counties was not made until May 25, 1937.

"The Financial Control Act, Acts 1935, page 803, provides for the adoption of a budget and that Counties shall operate within the income of the General Fund.

"Some Counties could not operate the above named agencies and also operate the necessary functions of County Government on the income of the General Fund. To keep from stopping the operation of these three agencies, such Counties advanced money from the General Fund with the expectation of reimbursing such fund from the proceeds of the Luxury Tax, when same was received. As a result of this, the General Fund is now short of necessary funds to complete this year's operation.

"Taking the above into consideration will you please advise me as follows:

"1. Can the Counties reimburse the General Fund from the proceeds of the Luxury Tax for the actual amount expended from such General Fund for the operation of said three agencies since March 1, 1937, at which time such Revenue began to accrue to the Counties?"

In my opinion, the question propounded in your letter of inquiry should be answered in the affirmative.

Section 21 of the Alabama Luxury (Sales) Tax Act provides among other things as follows:

"* * * provided that the funds divided and distributed to the several counties of the State as hereinabove provided for shall be used exclusively for full-time health service in cooperation with the State Board of Health and/or the Federal Government; for public welfare in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension services in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State."

This office in an opinion to Hon. P. C. Black, Judge of Probate, Geneva County, Geneva, Alabama, under date of April 27, 1937, held that the proceeds received by the several counties from the tax levied by this Act must be used by them exclusively for public health, public welfare, and agricultural extension service, the amount of the proceeds of the tax to be used by each of said agencies or units to be determined by the county governing body.

County governing bodies have long had the authority to appropriate, at their discretion, such sum or sums from the revenue in the general fund for the operation of public health, public welfare, and agricultural extension service agencies or units as they saw fit, provided that there was sufficient revenue available in the general fund for this purpose or these purposes after all involuntary obligations against said fund had been met (that is, all obligations of the county, the payment of which out of the general fund is made mandatory by statute). See Section 6755 of the Code of Alabama, 1923, dealing with the authority of the Court of County Commissioners or like governing bodies. Various and sundry statutes dealing with this general subject have been passed since the date of the adoption of the Code of 1923, but none of these has changed the authority of the county governing bodies to appropriate money from the general fund for this purpose or these purposes in any respect here material, and therefore an enumeration of these various statutes would serve no useful purpose and would only tend to lengthen this opinion unnecessarily.

Undoubtedly, the various county governing bodies could have failed to appropriate any sum or sums whatever from the general fund on or after March 1, 1937, for the purpose of carrying on public health, public welfare, and agricultural extension work in their counties. If this had been done, these three agencies or units could not have been heard to complain. This should have been done on that date if there were not available in the general fund sufficient monies with which to pay all involuntary obligations against it in addition to the amount appropriated for the operation of these three agencies or units, since Act No. 379, General Acts 1935, page 803, approved September 9, 1935, popularly known as the County Financial Control Act, required the various counties to which it is applicable to operate within the income of their general fund.

As stated in your letter of inquiry, the proceeds of the tax levied by the Alabama Luxury (Sales) Tax Act began to accrue to the counties on March 1, 1937, to be used by them exclusively, as held in the opinion to Judge Black, *supra*, for the operation of these three agencies or units. This fund became primarily liable for the expenses incurred in the operation of these three agencies or units as of that date, March 1, 1937, and obligations incurred in the operation of these three agencies or units between March 1, 1937, and the date on which the first proceeds from this tax were made available to the counties for disbursement, could have been paid out of these proceeds when they were received by the counties. If a county governing body of a county, whose income of the general fund was not sufficient to pay all involuntary obligations against it and also these three agencies or units to keep from paralyzing or stopping their operation until the proceeds received from the Luxury (Sales) Tax to be used for this purpose were available for disbursement, with the expectation that the general fund would be reimbursed in the amount so expended from it when the proceeds from said tax were received, then, in my opinion, the fund made up of the proceeds of the Luxury (Sales) Tax received by the counties, which is the fund primarily liable for the payment of the expense of the operation of these three agencies or units since March 1, 1937, became indebted to the general fund in the amount so expended from it in the operation of these three agencies or units during this period. In my opinion, not only have the county governing bodies who so acted the authority to reimburse their general fund from the proceeds from the Luxury (Sales) Tax received by them for the actual amount expended by them since March 1, 1937 for the operation of these three agencies or units, when the money was expended under such circumstances as set out in your letter of inquiry, but they are under a duty to so reimburse the general fund, in such an amount, from the proceeds received by them from this tax.

This opinion is in accordance with the previous holdings of this office on such questions. See Opinion of the Attorney General to Hon. Woolsey Finnell, Highway Director, Montgomery, Alabama, under date of September 28, 1928, Office Edition, Vol. 7, page 220, holding:

"Where funds in the treasury of the state, not primarily liable or intended for a certain expenditure by the State, issued as a temporary expedient, such funds should be reimbursed from the fund primarily liable and intended to be used for such purpose, as soon as practicable."

The particular question dealt with in that opinion was the authority to transfer money from the Highway Bond fund of 1927 in the amount of \$286,087.50 to the Public Road and Bridge or Gasoline Tax fund for the reimbursement of that fund for an amount which had been expended by it for the payment of an obligation for which the Highway Bond fund of 1927

was primarily liable, sufficient monies not having been available in the Highway Bond fund of 1927 to pay these obligations at the time, from a standpoint of expediency, they should have been paid, and monies available in the Public Road and Bridge or Gasoline Tax fund having been temporarily used for that purpose. This opinion held that not only should such a course be followed but that it became a duty to reimburse a fund so used, temporarily, out of the fund primarily liable, as soon as the condition of the fund primarily liable and intended to be so used permits of such a course of procedure. To the same effect is the holding of the opinion to the Chief Examiner, Department of Examiner of Accounts, Montgomery, Alabama, under date of October 1, 1928, found in Biennial Reports of the Attorney General, 1928-30, at page 3, which opinion dealt with the authority to reimburse the Fish Hatchery fund from the Game and Fish Protection fund for an amount which had been expended from the former for the payment of obligations for which the latter was primarily liable, the monies in the latter having been temporarily depleted at the time.

The premises considered, it is my opinion that a county governing body not only has the authority, but is under the duty, to reimburse the general fund from the proceeds received by it from the Luxury (Sales) Tax in the actual amount expended from the general fund for the operation of public health, public welfare, and agricultural extension service agencies or units since March 1, 1937, when there were not sufficient monies available in the general fund to operate the above named agencies and to also pay all involuntary obligations against it, and such monies were expended for this purpose or these purposes to keep from paralyzing or stopping the operation of these agencies pending the receipt by the counties of the proceeds of the Luxury (Sales) Tax, which was then accruing to them and was primarily liable for and intended to be used for the operation of these agencies or units, and said monies were advanced from the general fund for this purpose or these purposes with the expectation that the general fund would be reimbursed in such an amount from the proceeds to be received by the counties from the Luxury (Sales) Tax. This reimbursement should be made as soon as the condition of the fund made up of the proceeds of the Luxury (Sales) Tax will permit of such a course of procedure without interfering with the adequate full-time operation of these three agencies for which the proceeds of this tax are allocated.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 27, 1937.

State Highway Commission,
Capitol,
Montgomery, Alabama.

State Highway Commission—authority to fix compensation of employees—

Under Acts of 1931, page 9, as reaffirmed by Acts, 1935, page 2, the State Highway Commission has the authority to employ the necessary assistants, employees, etc. and, with the approval of the Governor, to fix their compensation, notwithstanding the Lapsley-Lusk Act (Acts, 1923, p. 124).

Opinion by the Attorney General.

Gentlemen:

I wish to acknowledge receipt of your request for opinion of August 21, 1937, as follows:

"We are requesting an opinion clarifying the law as it affects the governing power presently vested in the Highway Commission with the approval of the Governor to employ personnel and fix compensation necessary for the proper conduct of the department.

"Your attention is directed to Section 12 of an Act of the Legislature, Regular Session, 1927, found at page 352 of the Acts of 1927; also to an Act of the Legislature of Alabama, Extra Session, 1932, found on page 300 and known as the Bonner Salary Reduction Law; also to an Act of the Legislature of Alabama, Extra Session, 1933, (page 124) generally referred to as the Lapsley-Lusk Salary Reduction Act; also to an Act of the Legislature of Alabama, Regular Session, 1935, found on page 2.

"At the same time apprising you of the conditions prevailing at present in comparison with those to which reference is made as of September 1932.

"In September 1932, the operations of the department were confined to
Administration
Maintenance
Betterment and Contingencies
Emergency Federal Grant Preliminary
Construction employing Penal Labor

whereas, the present program constitutes

Administration
Maintenance
Contingencies and Betterments
Construction employing Penal Labor
Two Way Program (Counties participating)
*Three Way Program (Works Progress Administration and counties participating)
Special Grant Federal Construction Program
Regular Grant Federal Construction Program
Construction Central Office Highway Building

"As a concrete illustration, the operation as fostered under the *Three Way Program was promulgated in March of 1935 for the purpose of constructing low cost bituminous roads. At the beginning of this program, it was foreseen that this type of construction was new and foreign to the methods of construction which were formerly employed on regular construction projects. Other than promulgation of the Three Way Program, additional ones were added known as Two Way Program and Regular Grant Federal Aid Program. Under the Three Way Program, the Federal Government contributes one-third of the money, the State one-third and the County one-third. Under the Two Way Program, the County contributes one-half and the State one-half. Under the Regular Grant Federal Aid Program, the Federal Government contributes one-half and the State one-half. The addition of these programs contributed to the basic change of the entire organization of the department.

"Inasmuch as the methods employed on programs of previous existence have been basically changed, we were compelled to import skilled and competent supervision and pay prevailing wage scale as in existence from whence they came. On similar construction projects employing methods that had been used in the past, a resident engineer's salary based on maximum amount paid in September 1932 was \$200.00 per month with a 30% reduction in compliance with above mentioned Act, or maximum amount he could receive was \$150.00 per month.

"As a concrete illustration the record of a resident engineer whose assignment in September 1932 was purely inspection of the work performed at a construction camp in North Alabama employing penal labor used on items of construction consisting of and confined to grading and minor drainage built in accordance with specifications as required for construction at the time which did not demand the technicalities and qualifications as required by five years subsequent. That according to the payroll of July 1937, this same camp performed the work necessary for the complete construction from the first grading to the final bituminous surface as well as the complete operation of a rock crusher producing the aggregate for the surface. In other words, the road was graded, drained, aggregate placed, matted and sealed all of which required higher technical qualifications of the engineer in charge on account of demands or specifications for roads necessary to meet high speed traffic of modern times.

"The salary of this employee was \$200.00 per month in September 1932 and that although the duties of this same employee have been basically and technically changed, we are enabled to pay a maximum salary of \$140.00 per month on account of restrictions contained in Lapsley-Lusk Act of 1933; that this employee's duties are far different under the present set-up than it was in September 1932 that the specifications of road construction demands more technical inspection and supervision for present day needs; that this case is typical of 150 others appearing on the present payrolls of the Department in this main subdivision of the department's organization and that similar illustrations are as glaring in other divisions of the organization.

"Another illustration of this salary distinction came about as a natural resource that competent supervision had to be employed in the higher supervisory bracket. The division engineer in September of 1932 drew a salary of \$325.00 per month. Under a restriction as contained in the above Act constraining the department from paying maximum salary of \$227.50 per month. Another illustration is that the chief draftsman for the department who supervises preparation of plans and estimates employing seventy-five draftsmen and designers was paid on September payroll 1932, a salary of \$175.00 per month. Under restrictions of the above Bill, we are authorized to pay maximum salary of \$122.50 for this service. Another illustration is affecting the Accounting Department whereas new duties have been imposed on accountants whose maximum amount of salary paid on payrolls of September 1932 was \$175.00. Under the restrictions of the above Act, we are authorized to pay maximum salary of \$122.50 per month. Other illustrations are maximum salaries allowed to be paid mechanics—\$105.00 per month, shovel operators \$105.00, juniors engineers \$105.00 and foremen \$100.00.

"In addition to the above inequalities of salary distinction and as a specific instance of false economy, we are unable to employ efficient

power shovel operators at the maximum salary of \$105.00 per month. For your information, a power shovel costs approximately \$9,000.00 and this type of machinery is of delicate mechanism. Concerns employing skilled labor on this classification are having to pay 50% to 100% more than maximum, which we are enabled to pay under statutory restriction.

"A comparison of the work undertaken by the department as reflected by disbursements of fiscal year ending September 30, 1932 of \$7,283,657.96 and fiscal year ending September 30, 1935 of \$14,186,707.11 will furnish at a glance a substantiation for the necessity of employment of additional personnel and salary adjustments. In this connection, the amount of disbursements does not furnish a clear picture without reference to difference in methods employed. The Two Way Program and the Three Way Program are of Force Account nature and supervision and actual construction is handled and payments are made to individuals whereas on methods employed on construction as of September 1932, all work was on contract basis. As a consequence of the different methods employed, the additional work throughout the department can be readily seen from number of warrants drawn by the Comptroller for this department for fiscal year ending September 30, 1932 of 19,333 compared with fiscal year ending September 30, 1935 of 117,318. Your attention is also directed to amount of money expended for payrolls for the month of July 1937—\$255,866.76 compared with \$107,480.52 for the month of September 1932. Inasmuch as the present organization has been basically changed from the Highway Department of September 1932, 65% of the present employee personnel were not in existence in the month of September 1932.

"As a consequence of salary distinction and our inability to pay a living wage on account of restrictions contained in bill referred to, we have lost technicians exceeding 150 since January 1935.

"It would be amiss in not calling to your attention those remaining with the department on account of choice for personal reasons and some efficient in all other things than securing new employment not receiving salary sufficient to obtain the necessities of life.

"We trust that we are not presuming when we state that after reviewing the facts as recited above that it is evident that the department's operation cannot go forward in an efficient and intelligent manner.

"Question. Inasmuch as the Highway Commission is unable to operate the department efficiently as contemplated and use yardstick as set forth in Senate Bill No. 183 Lapsley-Lusk, we are requesting direction at your hands as to which Act of the Legislature presently applies."

In my opinion, the State Highway Commission may employ such assistants, engineers, superintendents, chemists, foremen, laborers and any other help as may be necessary for the proper carrying on of the work of the State Highway Department and, with the approval of the Governor, may fix their compensation, as is provided by Acts, 1927, page 352 (Michie's Code 1928, Section 1397 (14)) as amended by Acts of 1931, page 9, Section 12, and as reaffirmed by Acts, 1935, page 2, Section 3.

The legislature has never undertaken to deal with details of the operation of the State Highway Department. Apparently realizing that the highly technical work of the Highway Department best could be entrusted to techni-

cally trained executives, the legislature, since the early days of the modern road construction era, has given the Commission carte blanche, subject only to the approval of the Governor, in the employment of its personnel and in the fixing of their compensation.

In the Act of 1911 establishing the State Highway Commission (Acts, 1911, p. 223) it was provided:

"With the consent and advice of the commission, the State highway engineer may employ a stenographer and such assistant engineers as may be from time to time necessary for the proper carrying on of the work, and fix their compensation."

This general authority was first couched in substantially its present day language by the Arnold Act (Acts, 1919, p. 890, Section 4), as follows:

"He (the state highway engineer, we interpolate) shall keep a record of every act of the State Highway Commission and, with the consent of the Commission, subject to the approval of the Governor, he may employ such assistant engineers, chemists, clerks, stenographers, draftsmen, foremen and laborers as may be necessary for the proper carrying on of the work of the State Highway Department, and fix their compensation, which shall be paid out of the State Highway Fund."

In the Foster Act of 1923 (Acts, 1923, p. 370, Section 4) it was provided:

"The Commission shall also employ such assistant engineers, chemist, clerks, stenographers, draftsmen, foremen, and laborers as may be necessary for the proper carrying on of the work of the State Highway Department and may fix their compensation and the time of payment which shall be paid out of the State Highway Fund."

In the Alabama Highway Code of 1927 (Acts, 1927, p. 348, Section 12) it was provided:

"Section 12. Records of Highway Commission; Assistants, Clerks, etc., The state highway commission shall keep an official record of all its acts and doings. The commission shall also employ such assistant engineers, superintendents, chemists, clerks, stenographers, draftsmen, foremen, laborers, and any other help, as may be necessary for the proper carrying on of the work of the state highway department and may fix their compensation and the time of payment which shall be paid out of the state highway fund."

The Tunstall Act of 1931 (Acts, 1931, p. 8, Section 12) provides:

"Section 12. That Section 12 of Article 1 of said Act, be and the same is hereby amended so as to read as follows: Section 12, (1311) RECORDS OF HIGHWAY COMMISSION; ASSISTANTS, CLERKS, ETC. The State Highway Commission shall keep an official record of all its acts and doings. The Highway Commissioner shall, with the approval of the Governor, employ such engineers, assistant engineers, superintendents, chemists, clerks, stenographers, draftmen, foremen, laborers, and any other help as may be necessary for the proper carrying on of the work of the State Highway Department, and may, with the approval of the Governor, fix their compensation, and the time of payment, which shall be paid out of the State Highway funds."

This 1931 Act was passed and approved by the same legislature and executive who later enacted and approved the Bonner Act (Acts, 1932, page 300) and the Lapsley-Lusk Act (Acts, 1933, page 124), *infra*.

Section 1 of the Bonner Act provides:

"Section 1. That the salary of each and every officer and employee of the State or any department thereof who was receiving on January 1, 1932 more than \$1200.00 per annum, as compensation for services performed for the State as salary or compensation, be, and the same is hereby reduced as follows: Any officer or employee of the State of Alabama receiving \$12,000.00 or more per annum shall be reduced 33 1/3 per cent; any officer or employee of the State receiving \$10,000.00, and less than \$12,000.00 shall be reduced 32 per cent; any officer or employee of the State receiving \$8,000.00 and less than \$10,000.00 shall be reduced 30 per cent; any officer or employee of the State receiving \$6,000.00 and less than \$8,000.00 shall be reduced 20 per cent; any officer or employee of the State receiving \$4,000.00 and less than \$6,000.00 shall be reduced 15 per cent; any officer or employee of the State receiving \$2,000.00 and less than \$4,000.00 shall be reduced 10 per cent; any officer or employee of the State receiving \$1,200.00 and less than \$2,000.00 shall be reduced 5 per cent; and any officer or employee of the State receiving \$1200.00 or less shall suffer no reduction. Provided no reduction made herein shall reduce the salary received by any officer or employee below a minimum of \$1200.00 per annum. The above scale reduction shall apply to the pay roll as of January 1, 1931 and to any office created subsequent thereto. Provided however, that if any salary has, since January 1, 1931, been reduced to a greater extent than the above provisions would reduce it, the reduction already made shall remain in effect, and such salary shall not be increased by the provisions of this Act. Provided, however, that Circuit Judges and Circuit Solicitors in Judicial Circuits of more than one county shall each receive the sum of One Hundred Dollars per annum for each county of their Judicial Circuit over and above one, the said additional allowance to be in reimbursement for their reasonable expenses while in attendance on court outside of their home county; provided further that the salary of the Secretary of the State shall be \$4,000.00 per annum; the salary of the State Auditor shall be \$4,000.00 per annum; and the salary of the State Treasurer shall be \$4,000.00 per annum; and the salary of the Chief Examiner of Accounts shall be \$4,000.00 per annum."

Of course, it was as applicable to the officers and employees of the State Highway Department at the time of its enactment as it was to every other agency and department of the State.

This act was superseded by the more drastic Lapsley-Lusk Act which, as to many of the State Departments, fixed the compensation of the officers and employees at stated amounts. In the Highway Department the only officer or employee so dealt with was the Highway Director whose salary was fixed at \$4,800.00 per annum. Section 6 of that Act (Acts, 1933, page 124, Section 6) provided a general formula for reducing the salaries and compensation of officers and employees then holding office or in the employ of the State, whose compensation was not therein fixed at specific amounts. In this category were all the then offices and the then employments of the Highway Department, excepting the office of State Highway Director.

Said Section 6 provides:

"Section 6. The maximum annual salary or compensation which may be paid to any officer or employee of any department, board, or commission of the State, whose salary or compensation is not hereinabove fixed, shall not exceed, seventy percent of twelve times the salary paid

such officer or employee for the month of September, 1932. Provided however, that nothing in this act shall authorize the reduction of any compensation or salary below twelve hundred dollars per annum. Provided, further that this act shall not operate to increase the present salary of any officer or employee."

And the formula therein provided was applicable to effect the reduction of the compensation of all of the officers and employees of the Highway Department, then holding office or in the employ of the Department, whose compensation theretofore had been fixed by the Highway Commission as is authorized by law.

But one of the first acts of the legislature of 1935 was to change the executive personnel of the State Highway Commission and to reaffirm the authority of the Commission to employ the necessary assistants, employees, etc. and to fix their compensation.

Act No. 2 of that session (Acts, 1935, p. 1), approved January 24, 1935, provides:

"Section 1. There is hereby created a State Highway Commission composed of three members to be appointed by the Governor and to serve at the pleasure of the Governor.

"Section 2. In making the appointment of the three members of the State Highway Commission the Governor shall designate their terms of office not to extend beyond the present term, and shall designate one such member as President and the other two as Associate Members.

"Section 3. The duties of the State Highway Commission and the powers of said Commission shall be the duties and powers now or hereafter to be prescribed by law.

"Section 4. That the salaries of the members of the State Highway Commission shall be thirty-six hundred (3,600) dollars per year, payable monthly out of the State Treasury, as other salaries are now paid.

"Section 5. That all laws and parts of laws in conflict with any provision of the Act be and the same are hereby expressly repealed."

Note particularly Section 3. What were "the * * * powers now * * prescribed by law", with which the Commission was invested?

In my opinion, they were the same powers with which it had been vested for the quarter of a century of its existence, viz., to have full and complete charge and control of highway construction and management in Alabama. And included within that plenary power of control and management of highway affairs was the authority and power to employ the necessary assistants and employees, and, with the approval of the Governor, to fix their compensation—which had become the declared public policy in Alabama by its reaffirmance quadrennially by every legislature since 1911.

That this general authority vested in the Highway Commission by the 1935 Act is without any limitation as to what the salaries of the several employments were for the month of September, 1932 (the "index" month under the Lapsley-Lusk Act) is apparent when the situations which confronted the two legislatures which enacted them are considered.

When the legislature assembled in extra session in 1933 enacted the Lapsley-Lusk Act, the country and the State were in the throes of the depression at its worst. State revenues were radically reduced and the opera-

tions of the several departments were materially curtailed. The State was, or recently had been, operating on borrowed money, and, in many instances, sufficient funds for the operations were not available so that warrants or certificates of indebtedness were not readily convertible into actual money. The legislature fixed the formula for the reduction of compensation of employees as an emergency measure. It was intended to apply to offices and employments of the State, the compensation of which was not definitely fixed by law, which were then in existence and being held or occupied during the month of September, 1932; and the salary paid to the several holders of the offices and employments during the month of September, 1932, was made the index to which the formula for reduction of compensation was applicable.

In 1935, as witness the material increase in the operations of the Highway Department, many employees were necessary to carry on the business of the several departments of the State, who were not necessary during the month of September, 1932, when the operations of the several departments were materially reduced.

In the Highway Department the unprecedented grants, since 1934, of Federal aid funds and other Federal grants for highway purposes to further the national policy of work relief to combat unemployment, of itself, required the creation of many employments which were not in existence during the month of September, 1932. The regulations promulgated by the several Federal agencies making such grants as to the manner and detail in which said funds should be expended on road construction projects, greatly increased the necessity for technically trained employees in the department to supervise such projects.

As to these employments there was no index, such as that fixed in the Lapsley-Lusk Act, upon which to fix the compensation of these new employees made necessary by the increased road construction work within the State.

No doubt the general improvement in the conditions throughout the State about that time materially increased the receipts of the Highway Department and of the several counties from the gasoline tax levies so that a larger program of road construction work was possible than could have been contemplated during September, 1932—thus further increasing the number of employees necessary to carry on such works.

In providing the compensation for these added employments, the Highway Commission and the Governor fixed the same without reference to the formula of the Lapsley-Lusk Act. For example, let us suppose that in 1935 the services of an assistant construction engineer were necessary in the inauguration and completion of a road project made possible by additional and unforeseen Federal aid grants; and that in September, 1932, there was no such employment, job or place as "Assistant Construction Engineer".

That the Highway Commission had the authority and the right to employ such assistant construction engineer, there can be no sort of doubt; and that the Lapsley-Lusk formula was impossible of application in fixing his compensation is equally clear.

So that, at the time of the enactment of the 1935 Act, *supra*, the legislature considered that in the Highway Department, as to those employments and jobs which had existed since September, 1932, the compensation of the employees was limited to 70% of twelve times the compensation paid to respective employees therein in the month of September, 1932; and that

as to those employments and jobs made necessary since the enactment of the Lapsley-Lusk Act (April, 1933) the formula of the said Lapsley-Lusk Act could not be applied, and that as to them the Highway Commission, with the approval of the Governor, fixed the compensation.

With this conflicting, confusing and inequitable situation in mind, the legislature re-invested the Highway Commission with all its formerly existing power and authority by the enactment of the 1935 Act, *supra*.

It is unthinkable that by so doing the legislature intended to continue in force as applicable to the Highway Department, the formula of the Lapsley-Lusk Act, which was wholly impossible of application and unworkable in fixing the compensation of many of the employments in the Highway Department.

The intention of the lawmakers is the law. **Birmingham v. Southern Express Co.**, 164 Ala. 529.

In my opinion, the Lapsley-Lusk Act is not applicable to the Highway Department in view of the enactment of the 1935 Act, *supra*.

Of course, the 1935 Act fixed the salaries of the Highway Commissioners at definite amounts per annum.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 30, 1937.

Alabama Public Service Commission,
State Capitol,
Montgomery, Alabama.

Attention of Mr. William F. Black, Director Transportation Bureau.

Contract Carriers—Contract carriers held not entitled to refund for amounts paid for license plates as provided for by Chapter 6, Article XIII of the Revenue Code of 1935.

1. No exemption for contract carrier qualified under Acts of 1932, p. 178, when such contract carrier is engaged in the business of hauling passengers in or through Alabama.

Opinion by Assistant Attorney General Small.

Gentlemen:

I have your letter of recent date in which you request my opinion as follows:

"I am attaching hereto a copy of a letter addressed to Mr. Ray Henson of the State Tax Commission by Greyvan Line, Inc., a motor carrier qualified under an Act of the Legislature of Alabama, approved October 28, 1932 (H. 113), which letter is self-explanatory.

"The matter was referred by the State Tax Commission to the State Highway Department and the latter Department in turn referred it to

"this Commission to render an opinion in connection with the claim presented as it concerns primarily a matter of automobile license taxes. Indirectly it calls for a construction of the Act referred to above.

"The claim, briefly stated as I understand it, is that the provision of Section 22 of the Motor Carrier Act referred to reading 'the taxes imposed by this section shall be increased fifty per cent if the annual license taxes prescribed by the law of this State on like vehicles is not paid because such motor vehicle is engaged in 'interstate commerce' authorizes the claimant to operate in this State without the purchase of license plates.

"The license statute is contained in the General Revenue Act of 1935.

"Please favor the Commission with an official opinion of this matter, copying to the State."

In reply I wish to advise that in my opinion a motor carrier operating under the provisions of the Acts of 1932, p. 178, defining and regulating contract carriers, is not entitled to a refund of amounts paid under the provisions of the Revenue Code of 1935 governing the purchase of registration plates, and more particularly as governed by Schedule 158.15 of the Revenue Code of 1935, as amended by Act No. 177, approved April 21, 1936, (General Acts 1935, p. 208).

I wish to refer you to an opinion of the Attorney General addressed to Hon. Ray Henson, Chief Clerk, Automobile Department, State Tax Commission, Capitol, under date of October 6, 1936, (Quarterly Report of Attorney General, Vol. V, p. 17).

Since the only question for consideration here concerns Section 22 of the above referred to Motor Carrier Act, and particularly to that part reading as follows: "The taxes imposed by this section shall be increased fifty per cent if the annual license taxes prescribed by the law of this State on like vehicles is not paid because such motor vehicle is engaged in interstate commerce," I wish to refer to and quote from the above cited opinion of the Attorney General, which opinion, in my judgment, clarifies the question here at issue.

"Subsequent to the 1923 Motor Vehicle Act and prior to the 1935 General Revenue Act, Act No. 273, approved June 19, 1931 (Acts 1931, p. 303) and Act No. 159, approved October 28, 1932 (Acts 1932, p. 178) were enacted.

"The 1931 Act commonly known as the 'Common Carrier Act' defines transportation companies and motor transportation companies, and provides for their supervision, regulation and taxation.

"The 1932 Act defines 'Contract Carriers' and Common Carriers not subject to the 1931 Act and regulates the transportation for hire of persons and property on public highways by motor vehicles operated by contract carriers, provides for issuance of permits, posting of bonds, etc.

"While both Acts levy mileage taxes, they are both essentially regulatory in their nature and are directed at the persons operating as carriers rather than at the motor vehicle itself. The contract act specifically declares that the excise tax levied is under the police power of the State (Section 22).

"There is nothing, as I read the two Acts, limiting or changing the liability of the motor vehicle itself from securing the proper motor

vehicle license as levied by the revenue laws, except this provision found in Section 22 of the 1932 Act.

"The taxes imposed by this section shall be increased 50% if the annual license tax prescribed by the law of this State on like vehicles is not paid because such motor vehicle is engaged in interstate commerce."

"The only reason I can offer for this provision is that it was inserted out of excess of precaution. The State in requiring a license of motor vehicles operated on the public roads of Alabama is exacting a charge for the use of such roads. *Foshee v. State*, 15 Ala. App. 113, 72 So. 685; *Bozeman v. State*, 61 So. 604; *Ex Parte Bozeman*, 183 Ala. 91-103, 63 So. 201. That a state may levy such a charge on motor vehicles moving in interstate commerce is no longer in doubt. *Kane v. N. J.* 242 U. S. 160; *Hendrick v. Maryland*, 235 U. S. 610; *State v. Oligney*, 162 Minn. 302, 202 N. W. 893, 42 C. J. 670.

"However, Section 22 also provides:

"Such mileage tax shall be paid by such common or contract carrier in addition to all other property, franchise, licenses, or other taxes, fees and charges now or hereafter prescribed by law."

"It seems plain from this that there was no purpose to disturb the laws relating to licensing of motor vehicles."

In my judgment the conclusions reached in the opinion above quoted and referred to, are correct and applicable to the supposition under consideration here. It is, therefore, my opinion that your question is answered by the above quoted portion of the above opinion, and that a motor carrier operating under the provisions of the Acts of 1932, *supra*, and the Revenue Code of 1935, Article XIII, Chapter 6, is not entitled to a refund of amounts paid for license plates as provided for under the above cited Revenue Laws of 1935.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 30, 1937.

Hon. W. H. Coleman, Circuit Clerk,
Sumter County,
Livingston, Alabama.

If a suit is brought against two co-defendants and there is a recovery against only one of such co-defendants, the co-defendant who was successful in his suit cannot be required under any circumstances to pay trial tax and stenographer's fees.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 7, 1937, in which you request my opinion as follows:

"When execution against the defendant is returned 'No property found', execution may issue against the plaintiff in the name of the Clerk or the Register of the court for all of the costs created by him in obtaining his judgment.

"The following situation has arisen in this office: A suit was filed by one plaintiff against two defendants jointly.

"A verdict was rendered in the amount of one cent against one defendant and in favor of the other defendant, that is, one defendant paid one cent in open court immediately after the verdict was rendered and the other defendant was successful in his suit.

"An execution was issued and returned 'No property found', kindly advise what cost can be assessed to each defendant in this case?

"What I want to know is can I collect the Trial Tax and the Stenographer's fees in this case from the defendant who has won the suit after having been sued by the plaintiff?"

Where there is a judgment in favor of either party, such party is entitled to his costs unless it be otherwise directed or portioned by the Court. See Section 7221, Code of Alabama, 1923, which is as follows:

"Section 7221. Costs given to successful party, or apportioned at discretion of court.—The successful party in all civil actions is entitled to full costs for which judgment must be rendered, unless in cases otherwise directed by law or by the judgment of the court. The court may apportion the costs at his discretion as justice and equity may require; and this provision is applicable in all cases in which the state is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security; but this section shall not apply to justice of the peace courts; but in such courts, the successful party shall recover his costs." **Buxbaum v. McCorley**, 99 Ala. 537.

The defendant who was successful in his suit cannot be charged with the costs, unless under the above quoted section, the Court makes an apportionment of the costs taxing such successful defendant with certain amounts of said costs.

I see that the plaintiff only recovered one cent damages against one of the co-defendants. In this connection, I call your attention to Section 7223, of the Code of Alabama, 1923, which is as follows:

"Section 7223. Rule for recovery in torts, if verdict is for less than twenty dollars; exception.—In all actions to recover damages for torts, the plaintiff recovers no more costs than damages, where such damages do not exceed twenty dollars, unless the presiding judge certified that greater damages should have been awarded; and on failure to certify, judgment must be rendered against the plaintiff for such residue."

I do not get from your letter just the nature of the action in this case, but if it was an action involving a tort and the judgment recovered does not exceed twenty dollars, the plaintiff can recover no more costs than damages, unless the presiding judge certified a greater judgment should have been awarded. So it depends on the nature of the action on which the judgment is based.

However, I do not think you can, under any circumstances, collect the trial tax and the stenographer's fees out of the defendant who was successful in the suit for the reason set out above.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 1, 1937.

Hon. U. G. Jones,
Deputy Solicitor,
Elmore County,
Wetumpka, Alabama.

Alabama Beverage Control Act—

1. A person who legally buys whiskey from a State Store may legally carry same to his home in a dry county and there pour it into glasses and serve it to his family and friends.

2. There is no violation of the law against "distribution" as that term is used in the second paragraph of Section 51 of the Alabama Beverage Control Act, where a person legally purchases a quantity of whiskey, carries it into a dry county on a fishing trip or other social function, and he and his friends drink it, either from the original container or by pouring it into individual glasses and serving it, so long as there is no sale involved.

3. A person who lives in a dry county cannot legally send another to a State Store to purchase for him a quantity of whiskey and upon that person's return with the whiskey pay him the purchase price of the same, since such a transaction amounts to a sale of alcoholic beverages contrary to the Alabama Beverage Control Act.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 14th, 1937, in which you ask my opinion as to the following:

"1. May a person who legally buys whiskey from a State Store carry this whiskey to his home in a dry county and there pour it into glasses and serve it to his family and friends?

"2. If a person legally buys a quantity of whiskey and carries it into a dry county on a fishing trip or other social function, and he and his friends drink it together, either from the bottle it came in or by pouring it into individual glasses and pass it around, is there a violation of the law as contemplated by the term 'distribution' as used in the second paragraph of section 51 of the Alabama Beverage Control Act, it being understood that there is no element of sale involved?

"3. May a person from a dry county send another to a state store and purchase for him a quantity of whiskey, and upon his return with the whiskey, pay the person sent the purchase price expended for the whiskey?"

In my opinion, the first two questions of your inquiry should be answered in the affirmative, and the third question in the negative.

The answer to all three of your questions hinges upon the construction placed upon the term "distribution" as it is used in the second paragraph of Section 51 of the Alabama Beverage Control Act. This paragraph reads as follows:

"In all dry Counties, as defined in this Section, the Statutes of Alabama prohibiting the manufacture, sale or distribution of Alcoholic Beverages shall remain in full force and effect, and any person, firm, or corporation convicted of violating any of the provisions of the present statutes of Alabama regulating or defining the illegal manufacture, sale or distribution of alcoholic beverages shall be punished as now provided by such laws."

Since the first two questions are so closely related, they will be treated here jointly. In the first place, the word or term "distribution", as used in said Act, carries with it a broader meaning than the mere drinking of liquor from a bottle or pouring it into glasses and serving it to friends as a special drink, as distinguished from the term "otherwise disposed of," as used in Sections 4618 and 4621 of the Code of Alabama of 1923. One must bear in mind that under said sections of the old Act it was unlawful to have intoxicating liquors in one's possession, even in one's home, or to give it away, or to dispose of it in any manner whatsoever, which is not true under the present Act, so long as no sale or distribution is involved.

Webster defines the word "distribution" as the act of distributing; the dividing or apportioning among several or many, as the distribution of gifts; physical conveyance of commodities from producer to consumers; transportation, etc.

The reading of Section 51 of said Act, in conjunction with the above definition leads me but to the conclusion that the legislature in using the word "distribution" in said Act contemplated such a distribution of alcoholic beverages as would influence or tend to influence commerce, as the distribution or parceling out of one or more bottles or cases of liquor. For instance, one could not purchase any quantity of liquor at a state store and take it into a dry county and apportion it out to others and collect the purchase price from them, even though no more than the actual cost of the liquor was collected, since such would amount to a sale of the same in violation of the provisions of the said Act.

By the same reasoning, your third question must be answered in the negative. A person who goes to a State Liquor Store and purchases for another a quantity of whiskey and upon his return with the whiskey collects from such other person the purchase price expended for the same is doing nothing more or less than selling the whiskey which he has so bought to the other person in violation of the provisions of the Alabama Beverage Control Act. We are persuaded that such a transaction comes "'under the ban of our laws' prohibiting the sale or distribution of alcoholic beverages in any manner other than provided by the Alabama Beverage Control Act." See opinion of the Attorney General to Hon. Wm. O. Baldwin, Chairman, Alabama Alcoholic Beverage Control Board, under date of August 10, 1937, and the authorities therein cited and quoted from.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 1, 1937.

Hon. Malcom E. Nettles,
County Solicitor, Walker County,
Jasper, Alabama.

Licenses—Operator of bus who contracts with employees of a certain company to take them to and from work and hauls no others is liable for license required by Schedule 158.3 as amended by Acts 1935, page 1118.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date, which is as follows:

"Please submit to me your opinion on the following: Fifty or sixty employees of the Alabama-By-Products Corporation, reside at Cordova, three miles from their work at the mines. It is necessary for them to make a round trip to the mines each day, these men have contracted with a man who has a bus to carry them this round trip each day for ten cents, this is the only carrying of passengers or receiving of fares done by this bus owner.

"Should he take out licenses under section A of the schedule number 158.3 on page 330 of the 1935 revenue code which would cost 100.00 dollars plus mileage? Or should he take out licenses under section B and C of schedule number 158.3?

"This man does not haul any other passengers except these mine employees.

"It would be impossible for the man to operate under section A unless he charged the men more and this would be prohibitive."

Schedule 158.3 of Revenue Act 1935 referred to in your letter, has been amended by Acts 1935, page 1118. The amendment is as follows:

"Section 1: That Schedule 158.3 of Section 348, in Chapter 6 of Article XIII, of an Act of the Legislature of Alabama approved July 10, 1935 entitled "An Act to provide for the General Revenue of the State of Alabama," be, and the same is hereby, amended so as to read as follows: Schedule 158.3. (a) Each automobile, motor car or motor bus used for transporting passengers paying fare or charges, shall pay the following named amounts for license tax: With seating capacity for five persons, or less \$37.50, with seating capacity of more than five and not exceeding ten, \$50.00. With seating capacity of more than ten and not exceeding fifteen, \$75.00. With seating capacity of more than fifteen and not exceeding twenty, \$100.00. With seating capacity of more than twenty and not exceeding forty, \$150.00. With seating capacity exceeding forty, \$200.00. (b) Each person desiring to take out a license to operate a motor vehicle for the transportation of passengers for hire, except taxicabs and touring cars hired by the hour or for special trips on terms agreed upon between the passenger and the carrier at the time of entering upon such service, shall at the time he applies for such license make out in writing a statement describing the route over which such motor vehicle, shall be operated and naming the terminal points thereof, and such route shall be plainly indicated on the motor vehicle in letters of sufficient size to be read at a distance of fifty feet. (c) For each motor

vehicle operated as a part of a Taxicab, or similar system, the following license tax shall be charged: (a) For each automobile not exceeding 2500 pounds in weight, Eleven and 25/100 Dollars (\$11.25); (b) For each automobile weighing over 2500 pounds, but not exceeding 3000 pounds in weight, sixteen and 75/100 Dollars (\$16.75); (c) For each automobile weighing in excess of 3000 pounds, but not exceeding 3500 pounds in weight, Nineteen and 25/100 Dollars (\$19.25); (d) For each automobile weighing over 3500 pounds, but not exceeding 4000 pounds in weight, Twenty-six and 25/100 Dollars (\$26.25); (e) For each automobile weighing in excess of 4000 pounds Thirty Dollars (\$30.00).

The above imposes a license on each automobile, motor vehicle or motor bus used for transporting passengers paying fares or charges.

The operator in the instant case clearly comes within the provisions of the said section in that the transportation is by means of bus used for transporting passengers paying fares or charges. In my judgment, it is immaterial that the operator contracted with only a certain group at certain terms. He comes within the provisions of Section (a) of said Schedule and also within the provisions of Section (b) thereof in that he is not operating a taxicab or other similar vehicle or touring car hired by the hour for special trips. He is the operator of a bus which charges passengers fare for transporting them from one location to another at fixed times, although he may contract with only a certain group or groups.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 1, 1937.

Hon. E. C. Whelan,
License Inspector,
Jefferson County,
Birmingham, Alabama.

Licenses—

1. Person operating laundry, cleaning, pressing and dyeing business, pick-up stations, also cleaning feathers, cleaning and blocking hats and cleaning rugs, due license for each business .

2. Person operating lumber yard and also repairing roofs due license for operating roofing shop under Schedule 110 of the Revenue Laws of 1935.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"(1) If a laundry pays a license under Schedule 79 and also does business singly or in conjunction with, such as cleaning and pressing and dyeing, also operating pick up stations for cleaning and pressing and dyeing as described in Schedule 35, also cleaning feathers as described in

Schedule 60, and cleaning and blocking hats as described in Schedule 70, and cleaning rugs as described in Schedule 88, would they be due a license under each schedule mentioned above?

"(2) If a person, operating what is commonly known as a cleaning and pressing establishment and paying a license for same under Schedule 35, would they be due a license for doing business singly or in conjunction with as described in Schedule 70 and Schedule 88, especially as to places maintained or operated for the reception or collection of such articles except at the locations where pressing, cleaning or dyeing is done.

"(3) I will also appreciate very much if you will give me an opinion explaining Schedule 110 as we have had considerable trouble in interpreting this Schedule. Practically every person operating a lumber yard and paying a license under Schedule 83, also do a roofing business. For instance, the Walker Lumber Company will sell you roofing material or put an entire new roof on your house. Would they be for the purpose of taxing under Schedule 110 be operating a roofing shop and be liable for a license under said Schedule?"

Answering your first and second inquiries, I advise you that a person operating a laundry and, singularly or in conjunction therewith, operating a business commonly known as a cleaning and pressing and dyeing establishment together with the pick-up stations referred to in Schedule 35 of the 1935 Revenue Law, who also engages in the cleaning of feathers as described in Schedule 60, cleaning and blocking of hats as described in Schedule 70, and the cleaning of rugs, etc. as described in Schedule 88, must pay the license prescribed on each branch of the cleaning business in which he is engaged.

Section 356 of the Revenue Law of 1935 provides:

"Where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business."

In accordance with the above, therefore, the party operating as detailed by you in your inquiry No. 1 would pay the following licenses: (Figures are amounts payable in Jefferson County)

Operating Laundry (Sched. 79)	\$60.00
Operating Cleaning & Pressing Business (Sched. 35)	15.00
Dyeing done singularly or in conjunction (Sched. 35)	10.00
Each place maintained as "pick-up" station, not at location of cleaning, pressing and dyeing establishment (Sched. 35)	5.00
Cleaning and renovating feathers (Sched. 60)	20.00
Cleaning and blocking hats at "hat cleaning establishment" (Sched. 70)	10.00
Cleaning rugs, etc. (Sched. 88)	15.00

What has been said above with reference to the necessity of obtaining a license under both Schedule 35 (the cleaning and pressing license) and Schedule 70 (licensing a hat cleaning establishment) is subject to the limitations mentioned in an opinion of this office rendered May 15, 1937, to Hon. J. P. Laseter, Probate Judge, Barbour County. I enclose herewith for your convenience a copy of this opinion.

In connection with your second inquiry, see also Quarterly Report of the Attorney General, Volume 1, page 295.

Answering your third inquiry, I advise you that Webster says—"In the United States 'shop' means, especially, a place of manufacture or repair." Webster's New International Dictionary (2d Edition).

Considered in the light of the foregoing definition, it does not appear that the lumber company described in your inquiry, is in fact operating a "roofing shop" within the meaning of the term as used in Schedule 110 of the Revenue Act of 1935 and consequently such party would not be liable for the license prescribed by said Schedule.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 2, 1937.

Hon. Page S. Bunker,
State Forester,
Capitol,
Montgomery, Alabama.

Forestry Fund—State license tax on businesses "dealing with timber or timber products".

Privilege licenses imposed by Schedules 45, 59 and 123½ of the Revenue Act of 1935, as amended, should be paid, when collected, into the Forestry Fund.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"The State Commission of Forestry will greatly appreciate your opinion as to the proper disposition of revenue taxes derived as follows:

"Schedule 45, Act approved July 10, 1935, (General Acts of Alabama, Regular Session, 1935, p. 256), reading—

" 'Schedule 45. Each person engaged in operating a creosoting or other preservative treatment, plant where cross ties, cross arms, poles or other timbers are creosoted, one hundred dollars (\$100.00) for each plant;'

"Schedule 59 (Ibid.), reading—

" 'Schedule 59. Every person operating, a * * * paper mill, pulp mill * * * : Ten Dollars (\$10.00) where the investment for plant, equipment, supplies and fixtures is less than fifteen thousand dollars; Twenty Dollars (\$20.00) where the investment for plant, and fixtures is fifteen thousand dollars and less than twenty-five thousand dollars. Thirty Dollars (\$30.00) where the investment for plant, equipment, supplies and fixtures is twenty-five thousand dollars and less than fifty thousand dollars; Fifty Dollars (\$50.00) where the investment for plant, equipment, supplies and fixtures is fifty thousand dollars and less than one hundred thousand dollars: One Hundred Dollars (\$100.00) where the investment for plant, equipment, supplies

and fixtures is one hundred thousand dollars and less than five hundred thousand dollars; One Hundred and Fifty Dollars (\$150.00) where the investment for plant, supplies and fixtures is five hundred thousand dollars and less than one million dollars; Two Hundred Dollars (\$200.00) where the investment for plant, supplies and fixtures is one million dollars and over * * *;

"Act approved March 2, 1937, Special Session, 1936-37, No. 231, reading—

"That Section 348, Article XIII, Chapter 1, of an Act entitled "An Act to provide for the general revenue of the State of Alabama" be and the same is hereby amended by adding thereto the following: Schedule 123½. Each person, firm or corporation engaged in the operation of a veneer mill, planing mill, box factory, handle factory, or any other factory where lumber or timber is sawed or made into a finished or semi-finished product, other than a saw mill licensed under Schedule 123, shall pay a privilege tax based on the number of men employed or engaged in the manufacture of the products produced by such mills, as follows: Where there are 5 or less men employed or so engaged—\$5.00. Where there are more than 5 men and less than 10 so employed or engaged—\$10.00. Where there are more than 10 men and less than 20 so employed or engaged—\$30.00. Where there are more than 20 men and less than 40 so employed or engaged—\$80.00. Where there are more than 40 men and over—\$120.00. It is the intention hereof where a person, firm or corporation shall pay a privilege tax under Schedule 123 or under Schedule 84, then no privilege license shall be charged or collected hereunder."

"Section 1005 of the Code of 1923 provides that all occupation licenses or privilege taxes imposed by the State for engaging in any business dealing with timber or timber products shall be paid into the State Forestry Fund. The Commission of Forestry regards that the receipts derived as occupation licenses or privilege taxes from the businesses and classes of business mentioned in the foregoing are to be paid into the State Forestry Fund. The Commission is desirous of your opinion in the premises."

In my opinion, your inquiry should be answered in the affirmative.

The Act of March 2, 1937, quoted, supra, appears to have been enacted to change the rule declared in a former opinion of this office appearing in Quarterly Report of the Attorney General, Vol. I, page 129.

Section 1005 of the Code of Alabama, 1923, has been re-enacted in Act of 1935, pages 1078, 1082, as follows:

"STATE FORESTRY FUND: WHAT CONSTITUTES. All occupation licenses or privilege taxes imposed by the State for engaging in any business dealing with timber or timber products and all fines and forfeitures arising under the provisions of this Article shall be paid into said Forestry Fund. All moneys going into said Fund are appropriated to said State Commission of Forestry for the purpose of administering this Article."

The businesses and occupations upon which licenses are levied by the Schedules, as amended, of Section 348 of the Revenue Code of 1935 quoted in your letter of inquiry, "deal with timber or timber products" within the

meaning of the Acts of 1935, page 1082, quoted, supra. It necessarily follows that State licenses imposed upon such businesses, when collected, should be paid into the Forestry Fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 2, 1937.

Hon. Josh Stanford,
Sheriff, Choctaw County,
Butler, Alabama.

Alabama Beverage Control Act—

Sheriff in dry county having reason to believe whiskey in dwelling is being kept for sale may enter dwelling house, where sheriff is authorized by proper search warrant, to search said dwelling.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 17, 1937, in which you request my opinion as follows:

"I have carefully read your recent opinion as to possession of stamped and/or identified alcoholic beverages purchased in accordance with the provisions of the Alabama Beverage Control Act in a filling station, cafe, or night club, in a dry county, and in which you hold that the possession in such a case is prima facie evidence that the same is held for the purpose of selling or distributing contrary to law. There are several night clubs or filling stations with little drink stands in connection therewith or a little joint in which there are a few things of value kept for sale and in which I have every reason to believe, and in fact know, that beer and other alcoholic beverages are being sold, but it is hard to prove an actual sale. Within a few feet of these little joints, the proprietor has a home, in which I have reason to believe the alcoholic beverages purchased in accordance with the beverage act, are kept in large quantities, but are carried therefrom to the little place of sale in small quantities. What I want to know is the following: (1) In Choctaw County, which is a dry county, under the Alabama Beverage Control Act, there are a number of filling stations and night clubs, in which I have reason to believe beverages purchased in wet counties, are being sold, and that larger quantities thereof are in possession of the proprietor of these places, in a dwelling house, within a few feet of the filling station or cafe. Would I have the right to search the dwelling in a case under the circumstances herein outlined?"

This office in recent opinions construing the Alabama Beverage Control Act has announced a number of legal principles which would be of enlightenment to us in a determination of the question submitted by you. In an opinion rendered to Hon. E. Dick Burrows, Sheriff, Walker County, under date of April 3, 1937, it was stated:

"Since the Act * * * makes unlawful the purchase, manufacture, sale, or distribution of any alcoholic beverages in a dry county, the

possession of legally purchased alcoholic beverages in a dry county for the purpose of sale or distribution would be illegal. The quantity of such beverages which one has in his possession might shed light upon the purpose for which he possesses the same. Of course, it would be a question for the court or jury, as the case might be, to determine from the facts in each individual case whether or not the possession of a given quantity of such alcoholic beverages was for an illegal purpose."

Again, we find it said in opinion addressed to D. E. Dunn, Assistant Administrator, Alabama Alcoholic Beverage Control Board, under date of July 29, 1937:

"As to alcoholic beverages which were originally purchased in a legal manner, i. e., from a State Liquor Store or from licensed retail dealers as the case might be, and which bear the proper stamps or identification marks, but which are being illegally sold or kept for sale, it is my opinion that such beverages should be forfeited and destroyed, in either a wet or dry county, in accordance with the provisions of Article 11 of Chapter 167 of the Code of Alabama, 1923, which is the Article of the old prohibition statute providing for the forfeiture and destruction of contraband liquors and other products. * * * The same procedure (condemnation under Article 11 of Chapter 167 of the Code of Alabama of 1923) should be followed in regard to any such legally purchased alcoholic beverages sold or kept for sale in a dry county in Alabama, since the sale of all alcoholic beverages in the dry county is prohibited."

Following the line of reasoning in the above mentioned opinion, it is my opinion that where a sheriff in a dry county has probable cause to believe that alcoholic beverages are being stored or kept in a dwelling house for purposes of sale, he may lawfully search such dwelling house provided he has first obtained the search warrant provided for in Sections 4741 et seq. of the Code of Alabama of 1923. The procedure in such cases must, of course, be in the manner provided for by said sections of the Code of Alabama of 1923, *supra*.

May I here caution you that while the sheriff in a dry county has the authority to seize such alcoholic beverages in a dry county, under the above circumstances, and whereas he would not be liable to the owner of such alcoholic beverages so seized, the question of whether or not such alcoholic beverages were possessed for the purpose of sale or distribution contrary to law remains a question for the court or jury, to be determined by all of the attendant circumstances. If, upon a trial of the issues, the court or jury, as the case may be, should decide in favor of the defendant, such finding amounting to a legal determination by them that said alcoholic beverages were not possessed for sale or distribution contrary to law, then the possession of same would be legal and the beverages should be returned by the officers to the person or persons from whom seized.

If, on the other hand, there is a conviction in the case mentioned by you, you should dispose of the alcoholic beverages seized by you in accordance with the provisions of the appropriate section of Article 11 of Chapter 167 of the Code of Alabama, 1923. See opinions of the Attorney General to Hon. William O. Baldwin, Chairman, Alabama Alcoholic Beverage Control Board, under date of July 29, 1937, and to J. Sam Clelland, Sheriff, Clarke County, under date of July 29, 1937.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 2, 1937.

Hon. E. Clyde Hudson,
Tax Assessor,
Blount County,
Oneonta, Alabama.

1. The language of the Constitution and statutes, "any lot in a city, town or village" does not restrict the homestead to one lot or piece of land. Two or more adjoining lots may be occupied and used as a homestead and for this purpose constitute one lot or tract.

2. Owner of farm who lives with his sister on her adjoining farm but who cultivates his own farm upon which there are no buildings, cannot claim tax exemptions on his farm, as being a homestead.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of July 29, 1937, which is as follows:

"Please advise me on the following at once if possible.

"No. 1. I have an assessment of two lots joining 2 houses built across the line of both lots, the owner living in one and his son living in the other without paying rent. Would this man be entitled to an exemption on both houses and lots?

"No. 2. Taxpayer living in his sisters house and cultivating his own land that joins the sisters land, but no buildings on his lands, however making his living on the land that belongs to him. Would he be entitled to an exemption on his land?"

You do not use the word "homestead" in connection with the word "exemption" but I am assuming that your questions are directed to the so-called homestead exemption law recently enacted by the Legislature of this State.

The "Homestead Exemption" Act, approved February 20, 1937, is in words and figures as follows:

"Section 1. The word 'homestead' as herein used is the 'homestead' as now defined by the Constitution and Laws of the State of Alabama.

"Section 2. Homesteads, as here defined, are hereby exempted from all State ad valorem taxes beginning October 1st, 1937.

"Section 3. In no case shall the exemption herein made apply to more than one person, head of the family, nor shall said exemption exceed Two Thousand Dollars (\$2,000.00) in assessed value, nor one hundred sixty (160) acres in area."

It is my opinion that your first inquiry should be answered in the affirmative if the value of the lots is not more than \$2,000.00 and if they are in area less than 160 acres.

Section 205 of the Constitution provides, in part, as follows:

"Every homestead not exceeding 80 acres, and the dwelling and appurtenances thereon, to be selected by the owner thereof, and not in

any city, town, or village, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwelling and appurtenances thereon owned and occupied by any resident of this State and not exceeding two thousand dollars, * * *"

In the case of **Miller v. Marx**, 55 Ala. 322, and in **David v. David**, 56 Ala. 49, it was held that the legislature could increase the exemption to 160 acres which is the law today.

I refer you to the case of **Tyler v. Jewett**, 82 Ala. 93, 99, 2 So. 905, from which I quote:

"The language of the Constitution and statutes '**Any lot in a city, town or village**' does not restrict the homestead to one lot or piece of land. Such would be a narrow and strict interpretation, not in harmony with the spirit or policy of exemption laws, nor with the settled rule, that they shall be liberally construed to accomplish their benevolent affects. A lot, or lots, may be surveyed and numbered, or otherwise designated, in the plan or map of the city, town or village, was not contemplated. When the homestead is urban, the limitation relates to the value, and not to the number or extent of the lots. **Two or more adjoining lots may be occupied and used as a homestead, and for this purpose constitute one lot or tract.** Where a person owns a lot, on which is the dwelling place of himself and family, he may require an abutting lot, and impress the character of the homestead by devoting it, in connection with his dwelling, and as appurtenant thereto, to the appropriate and requisite occupancy and uses, if the limitations as to value is not exceeded." (Emphasis ours)

The facts set out in your first inquiry are in line with the case of **Code v. Graffo**, 227 Ala. 11, 148 So. 591. They do not come within the operation of the rule stated in **Griffin v. Ayers**, 231 Ala. 493, 165 So. 593.

In my judgment, there is only one homestead and the fact that two houses are located thereon would not deprive the head of the family from receiving the exemption if the entire homestead including both lots and both houses does not exceed \$2,000.00 in value or 160 acres in area.

It is my opinion that your second inquiry should be answered in the negative. I am herewith enclosing a copy of an opinion recently rendered by this office to Hon. J. Russell Gibson, Tax Assessor, Pike County, on August 12, 1937, which answers your question.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Deed Tax—Filing Tax—

Mortgage filing tax held payable on balance due on extension agreement when same is offered for record, as provided for by Revenue Laws of 1935, Section 348, Schedule 94, sub-section (f).

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of recent date and the supplement thereto sent me recently which requests my opinion as follows:

"Enclosed you will find Photostatic Copy of Extension of Vendor's Lien from Sophia Poetz Douglas to Shepard Realty Company, Inc. Upon presentation for recording we wanted to charge a tax of \$75.75 on \$50,500.00. The party recording same seems to think that no taxes should be due.

"We would appreciate it very much if you would check this over and give us your opinion on same."

"In reference to your letter of June 21st, we beg to advise that we are enclosing the First part of Deed from Sophia Poetz Douglas to Shepard Realty Company, Inc., which was dated May 19, 1933, and recorded November 7th, 1936. We collected Tax on this Deed in the amount of \$2.00 Deed Tax and \$80.25 Mortgage Tax."

In reply, I wish to advise you that I have not set out verbatim the exact instruments presented to me but I have quoted what I consider to be the pertinent parts of these instruments for the purposes at hand. The original deed found in Deed Book 264, pages 246 and 247 of the County of Mobile Probate Judge Record, recites in part as follows:

"WHEREAS, Sophia Poetz Douglas, et al, executed a deed to A. L. Shushan, et al, of date November 28th, 1928, conveying the hereinafter described real property, and in which deed to secure the balance of the indebtedness due on the purchase price reserved a vendor's lien, and which said property was subsequently conveyed to Milton Investment Company; and,

"WHEREAS, the said vendor's lien provided that in case of a default in the payment of any interest or failure to perform any of the conditions that the said grantor would be authorized to sell the said property at public outcry after giving due notice thereof; and,

"WHEREAS, there has been default in the payment of the interest, and there has been a failure to comply with all of the conditions of the lien, and the said Sophia Poetz Douglas did publish in the Mobile Times, a newspaper of circulation in Mobile, Alabama for four times stating therein the time, place and terms of sale, and at said sale Shepard Realty Company, Inc., a corporation of Mobile County, Alabama, became the highest bidder in the amount of Fifty-five Thousand One Hundred Eighty-seven and 96/100 (\$55,187.96) Dollars,

"NOW, THEREFORE, in consideration of the sum of One Thousand and Six Hundred Eighty-seven and 96/100 (\$1,687.96) Dollars cash and the balance of Fifty-three Thousand Five Hundred (\$53,500.00) Dollars evidenced by two promissory notes of even date herewith, the first in amount Two Thousand (\$2,000.00) Dollars, maturing May 30th, 1934, and the second in amount Fifty-one Thousand Five Hundred (\$51,500.00) Dollars maturing November 30th, 1938, said notes bearing five (5%) percent interest until May 30th, 1934, and the note maturing November 30th, 1938, bearing interest at the rate of five and one-half (5½%) percent from November 30, 1933, interest is evidenced by eleven (11) promissory notes of date May 30th, 1933, all payable at semi-annual intervals during the life of this lien, I, Sophia Poetz Douglas, vendor, do hereby grant,

bargain, sell and convey unto the said Shepard Realty Company, Inc., all of the right, title and interest that the said Milton Investment Company had or has in and to the following described real property located in the City of Mobile, County of Mobile, State of Alabama, viz:”

Of the extension agreement, like the original deed, I have copied only certain parts which I consider pertinent to the instant opinion.

“STATE OF ALABAMA,
COUNTY OF MOBILE.

“WHEREAS, on the 19th day of May, 1933, Sophia Poetz Douglas executed her deed of conveyance to the Shepard Realty Company, Inc., conveying the following described real property situated in the City and County, of Mobile, State of Alabama, towit: * * *

“WHEREAS, in said deed of conveyance she retained a vendor's lien to secure the sum of Fifty-three Thousand Five Hundred (\$53,500.00) Dollars, of which Two Thousand (\$2,000.00) Dollars was formerly paid and on this date One Thousand (\$1,000.00) Dollars more has been paid, receipt of which is hereby acknowledged, leaving a balance of Fifty Thousand Five Hundred (\$50,500.00) Dollars; and,

“WHEREAS, the grantee desires an extension of said indebtedness secured by said lien for a period of ten years from the date of this instrument, and the said terms of extension having been agreed upon,

“NOW, THEREFORE, it is agreed between the said Sophia Poetz Douglas and Shepard Realty Company, Inc., that the vendor's lien reserved in the aforescribed deed is hereby extended for a period of ten years from this date, at the interest rate of four and one-half (4½%) percent per annum, payable semi-annually, which said interest is evidenced by semi-annual interest notes, payable at intervals of six months from the date of this instrument, each in amount Eleven Hundred Thirty-six and 25/100 (\$1136.25) Dollars.

“It is further specifically understood and agreed that this extension is upon the same terms, conditions and provisions as set forth in the aforescribed instrument which shall govern in every particular, except as to the amounts amended by this agreement of extension.

“IN WITNESS WHEREOF, the said Sophia Poetz Douglas has hereunto set her hand and seal and the Shepard Realty Company, Inc., a corporation, has caused these presents to be executed in its name by M. L. Dresner and Courtney Samuel, its President and Sect'y.-Treas., respectively, and its corporate seal hereto affixed on this the 1st day of May, 1937.”

Reading these two instruments together, I find that the first instrument is a deed reciting the amount paid and the balance due. Since there is no question concerning whether or not a deed tax is due on this particular instrument, I pass no opinion thereon here.

Concerning the instrument under date of the 6th day of May, 1937, quoted, supra, which is an extension agreement, it is my opinion that the mortgage tax of \$75.75 on \$50,500.00 is a correct and legal charge. I wish to refer you to Schedule 94 of Section 348, sub-section (f) of the Revenue Laws of Alabama 1935, which provides as follows:

“(f). When the time for the payment of the indebtedness secured by any such mortgage, deed of trust, contract of conditional sale, or

other instrument in the nature of a mortgage, is extended or renewed, and the extension or renewal contract is offered for record the tax required in this section shall be paid on the amount of indebtedness so extended or renewed; and the same be governed in all respects by the provisions of this subdivision. There shall be no ad valorem tax collected on any such instrument, or the debt secured thereby which shall have paid the tax prescribed by this section, either State, County or Municipal."

You will observe that the provisions of law governing tax on any such mortgage or extension or renewal contract as here presented for consideration is governed by the provisions of law set out in this section, sub-section (f), quoted, supra. I refer you particularly to the following clause thereof.

"* * * The tax required in this section shall be paid on the amount of the indebtedness so extended or renewed; and the same be governed in all respects by the provisions of this subdivision."

Premises considered, it is my opinion that the mortgage tax as provided for in the above quoted section and as charged by you on the balance due and for which the renewal contract for extension agreement is offered for record is a legal charge and due and payable.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. John D. McNeel,
Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

The term "billboard" as used in said Act does not include signs affixed to the side of fences, barns, etc.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of August 5, 1937, which follows:

"We are writing at this time requesting that you further clarify your opinion rendered to this Board under date of July 29 covering the term bill boards.

"Question: Would signs affixed to the side of fences, barns, etcetera, come within the definition of a bill board?

In the opinion rendered to you under date of July 29, 1937, which is referred to in your letter of inquiry, we held, among other things, that the term "billboard" as used in the Alabama Beverage Control Act designated a structure with a flat surface, annexed to the land, which has been erected for the purpose of placing thereon advertising matter. Unquestionably, fences, barns, etc. are structures with a flat surface, annexed to the land. However, it is equally true that such structures are not erected for the purpose of

placing thereon advertising matter. We think that this statement is not open to question.

Consequently, since, as held in the opinion to you, *supra*, such structures as the ones referred to therein must be erected for the purpose of placing thereon advertising matter, it is our opinion that signs affixed to the side of fences, barns, etc. would not come within the definition of the term "bill-board" as used in the Alabama Beverage Control Act. This for the reason that such structures are not erected for the purpose of placing thereon advertising matter.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. J. Lee Smith,
Probate Judge, Chilton County,
Clanton, Alabama.

Taxation—Record Filing Tax—

Release of property from recorded mortgage does not require record filing tax.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion in which you inquire if any record filing tax is due upon a certain instrument, which you enclosed, which has been offered for record in the Probate Office of Chilton County, Alabama.

An examination of the instrument discloses that it is nothing more than a release, upon payment, of certain property from the lien of a prior recorded mortgage conveying the said property to a mortgagee.

In my opinion, the provisions of the Revenue Act of 1935, relating to record filing taxes, do not apply to such a release. **Quarterly Report of the Attorney General, Vol. IV, page 28.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. J. C. Kellett,
Judge of Probate,
DeKalb County,
Fort Payne, Alabama.

County not required to pay trial tax when judgments are against county.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of August 23, in which you request my opinion as follows:

"Please advise me if the county is due to pay the Three (\$3.00) Dollar trial tax when judgments are entered against the county.

"I will thank you to give me an opinion on this as soon as possible as we have had several condemnation suits in this county in which juries have awarded judgments against the county."

I am of the opinion that the county is not liable for a trial tax where a judgment is entered against the county. This department has held that the State is not liable for this tax. (Opinion addressed to Hon. Chas. W. Lee, as State Comptroller, Capitol, Montgomery, Alabama, Book 4-A of Opinions of the Attorney General, at page 50). The county is but a part of the state.

In the words of the Supreme Court of Alabama in the case of **Montgomery Superintendent of Banks vs. State**, 228 Ala. 296, 153 So. 394:

"It is not, as supposed by learned counsel for appellant, a case of having two sovereigns in one and the same territory, or jurisdiction. There is but one sovereignty—the state—but that sovereignty extends to every county in the state. For all practical purposes—the effective governmental operation of the state and every political subdivision thereof—there is but one sovereignty, and whatever affects the revenues of the several political subdivisions of the state directly and immediately affects the state. It is a false idea to assume that the county is a separate entity from the state, that its revenues belong exclusively to the county, and are under its absolute control. Such revenues belong to the state, and may be appropriated by the state." (228 Ala. at page 301).

Further, it is the general policy of the state not to tax the counties unless the act clearly intends such taxation. And this is particularly true where part of the tax is to be used for county purposes. (See Opinion in the case of **Henry S. Long v. Roberts & Son**, 3 Div. 212, now on rehearing, in manuscript, with cases therein cited). Half of the trial tax is definitely for the use of the counties.

I am therefore of the opinion that the county is not required to pay the trial tax when judgments are against the county.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. R. J. Goode,
Commissioner,
Agriculture & Industries,
Capitol.

Coal Miners & Coal Dealers—All coal sold must be weighed and accompanied by a "delivery ticket" on delivery. The weighing must be done either by a public or private weigh-master (Sections 251, 252 and 253 and Sections 265-275 of Agricultural Code of 1927). Duty to enforce provisions of Agricultural Code upon Department of Agriculture & Industries.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date, which is as follows:

"We have been requested to enforce the law with regard to the weighing of coal sold in the State, as provided under Section 251, 252, and 253 of the Agricultural Code of Alabama, of 1927.

"In order that you may understand the practical problems involved, we wish to make the following statement of existing conditions:

"From information we are able to obtain, there seems to be well over five hundred coal mines being operated in the State. A large number of these mines are what are known as "wagon mines", where the coal is brought out with very little equipment, loaded on to trucks and sold both at wholesale and retail without having been weighed. The larger mines in the State maintain what is known as "tipple scales", which are used for the purpose of determining the amount of coal produced by the individual miners, and on which the miners are paid. Most of these larger mines also maintain wagon or truck scales, on which the coal is weighed when sold at retail or in small quantities.

"I would like to ask the following questions:

"1. Under Sec. 252 of the Agricultural Code of 1927, is it the duty of this Department to see that all coal sold from these small 'wagon mines' is weighed before being delivered to the purchaser?

"2. Would these small 'wagon mines' be required to maintain facilities at the mines for such weighing?

"3. Does Sec. 252 apply to the operator of the mine, or merely to the person engaged in retailing the coal?

"4. If it is the duty of this Department to require that all coal be weighed before it is delivered to a customer, could such coal be weighed on any scales suitable for that purpose which are available, but not owned or operated by the mines or truckers?

"5. In that event would it be necessary that persons weighing such coal qualify under Secs. 265-275 of the Agricultural Code of 1927?

"6. In the event there are no 'public scales' in a city or town on which coal may be weighed as provided under Sec. 251 of the Agricultural Code of 1927, what recourse has the dealer in the event he is requested by

a person to whom more than 500 pounds of coal is delivered to weigh such coal?

"7. Under Section 253 of the Agricultural Code, would the operator of a small 'wagon mine' who delivers coal to a wagon or truck for re-sale be required to comply with this Section, with reference to providing a delivery ticket and duplicate as provided under said Section?"

Before specifically answering your inquiries, I wish to set out Sections 251, 252 and 253 of the Agricultural Code of 1927. They are as follows:

"251. REGULATION OF SALE OF COAL.—When a dealer or dealers in coal in cities or towns, where public scales are kept, may be requested by a person or persons buying as much as five hundred pounds of coal at any one time to weigh such coal upon the public scales, said dealer or dealers shall do so, the person or persons buying the coal to pay the fee for weighing same, if such be of proper weight, otherwise such fee shall be paid by the dealer. Any dealer refusing to weigh or to have weighed such coal as required in this Section, or to pay such fee for weighing the same as herein required, shall be fined not more than Twenty (\$20.00) Dollars for each offense.

"252. COAL SOLD BY WEIGHT: TON.—It shall be unlawful to sell or offer to sell any coal, coke or charcoal in any other manner than by weight, and when sold by the ton, two thousand pounds avoirdupois shall be the weight of the ton. No coal, charcoal or coke shall be sold at retail which contained at the time the weight was taken, more water or other liquid substance than is due to natural conditions, weather conditions, or causes incident to the mining, cleaning or handling of the coal, charcoal or coke, except by and with consent of the purchaser.

"253. TICKET DELIVERED WITH COAL.—It shall be unlawful for any person to deliver any coal, coke or charcoal without such delivery being accompanied by a delivery ticket and a duplicate thereof, on each of which shall be in ink or other indelible substance, distinctly expressed in pounds, the gross weight of the load, the tare of the delivery vehicle, and the quantity or quantities of coal, coke, or charcoal contained in the vehicle used in such deliveries, with the name of the purchaser thereof, and the name of the dealer from whom purchased. One of such tickets shall be surrendered to the Commissioner or sealer of weights and measures upon his demand for his inspection, and this ticket or weight slip issued by him when he desires to retain the original shall be delivered to the purchaser of said coal, coke or charcoal, or his agent at the time of the delivery of the fuel; and the other ticket shall be retained by the seller of the fuel. When the buyer carries away the purchase, a delivery ticket showing the actual number of pounds delivered to him must be given to him at the time the purchase is made."

It will be seen from the above that coal can be sold by weight only and each delivery must be accompanied by a "delivery ticket" showing the weight, etc.

I am of the opinion that your first inquiry should be answered in the affirmative. It is the duty of the Department of Agriculture & Industries to enforce the provisions of the Agricultural Code of 1927. Since coal can be sold by weight only and each delivery must be accompanied by a "delivery ticket", it is necessary that the coal must be weighed before delivered to the purchaser. The sections above quoted are all inclusive and make no exception of so-called "wagon mines".

In answer to your second inquiry, it is my opinion that it is not necessary for the "wagon mines" to maintain facilities for weighing at the mines, but same must be available. As above stated all coal sold must be weighed before delivery.

In answer to your third inquiry, it is my opinion that Section 252 applies both to the operator of a mine and the person engaged in retailing coal. Said section is applicable to all sales of coal and makes no distinction as to the nature of the sale or the kind of seller.

Your fourth and fifth inquiries can be answered together. The weighing should be done under the provision of Sections 265-272 of the Agricultural Code of 1927. Section 265 provides as follows:

"265. WEIGHMASTERS.—All firms, corporations, co-partners or individuals engaged in the business of weighing for hire, who shall weigh or measure any commodity, produce or article, and issue therefor a weight certificate which shall be accepted as the accurate weight upon which the purchase or sale of such commodity, produce or article is based, shall be known as a public weighmaster, and all such weighmasters shall be appointed by the Commissioner; provided, that any firm, corporation or individual not engaged in the business of weighing for hire, but to whom the service of a certified weigher are necessary for the proper conduct of any business in which they may be engaged may upon application to the Commissioner have one or more of their employees or some other suitable person, designated by the said Commissioner to act as weighmaster for such firm, corporation or individual. Each weighmaster shall, before entering upon his duties, make oath, faithfully to execute his trust as a weighmaster. The Commissioner shall issue a certificate of such appointment or designation and shall keep a record of same."

It will be seen from the above that the weighmaster may be either a public one or a private one for a specific concern. The coal may be weighed by either type of weighmaster who must be properly qualified.

In answer to your sixth inquiry, it is my opinion that the dealer does not have to comply with the request of the purchaser under Section 251, supra., if there are no public scales in the town or city in question. However, as above stated, all coal sold must be accompanied by a "delivery ticket" on delivery. The dealer, therefore, must have his coal weighed by either a public or private weighmaster as above discussed.

The answer to your seventh inquiry is in the affirmative. This inquiry is discussed above. As there stated, all coal sold must be accompanied by a "delivery ticket". There is no exception as to "wagon mines".

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. C. E. McNatt,
Clerk, Circuit Court,
Franklin County,
Russellville, Alabama.

Where a person is convicted on a charge of operating a semi-trailer truck on the highways of this State, the height of which exceeds twelve feet, the fine in such cases goes to the Highway Commission.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 15, 1937, in which you request my opinion as follows:

"A person was convicted in this county on a charge of operating a semi-trailer truck on a highway, the height of which exceeds twelve feet, in violation of the General Acts of 1931, page 208. The court fined this person \$1.00. Please advise me if this fine goes to the fine and forfeiture fund of the county or does the fine go to the State Highway Department?"

You will find the Act of 1931, p. 28, was repealed by an act approved October 6, 1932, p. 68. See Section 8 of said act.

I call your attention to Section 16 of the Act of 1932, *supra*, which reads as follows:

"Use of Fines and Forfeitures. Section 16. All fines and bond forfeitures collected under the provisions of this Act shall be credited to the Commission and disbursed by it for the enforcement of this Act."

It is clear from the above section that the fine in cases of this character go to the Highway Commission and not to the fine and forfeiture fund of the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. F. G. Hereford,
Sheriff, Madison County,
Huntsville, Alabama.

Where a defendant on trial in a Justice of Peace Court, demands a jury trial, the only process by which the prosecution can continue is by indictment by grand jury, unless the statute prescribing the offense specifically provides otherwise.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of August 20, 1937, in which you request my opinion as follows:

"In regard to proceedings in Justice of Peace Courts as to bonding cases. We are having considerable trouble in this County in view of that fact that we cannot get the right opinion from authorities in this county as to whether or not a defendant charged with speeding, violating Alabama Traffic laws, etc. can in such case waive case to the Grand Jury. If this is true beg to inform that in my opinion we are at our roads end, as the Grand Jury in Madison County will not return indictments in cases of this kind.

"The Alabama Highway Patrol with several authorities of the Code to bear them out, informed me some time ago that no cases that they were making were being taken to the Grand Jury from Justice of Peace Courts. I was under the impression from Section 3854 of Criminal Code 1923, when defendant appears at Justice of Peace Court for trial, and demands a jury trial he is compelled to enter into bond with good sureties, pending the next session of the Circuit Court, failing to do so he must be committed to jail.

"Would like very much if you would help us out in any way you can, as we don't know the next step to take."

Section 3854 of the Code of Alabama of 1923 provides as follows:

"Section 3854. Proceedings when defendant demands trial by jury.— If the defendant demands a trial by jury, he must be required to enter into bond, when good sureties, conditioned for his appearance at the next session of the circuit court of the county to answer the charge; and failing to give such bond, must be committed to the county jail until the next session of the circuit court having jurisdiction of the offense unless he elect, in the meantime, to perform hard labor for the county as provided by law."

In construing this Section the Alabama Court of Appeals in the case of **Elmore v. State**, 24 Ala. App. 368, 137 So. 462, summarizes the law in these words:

"In the circuit court, unless otherwise specifically provided by statute, the only process by which the prosecution can continue is by indictment by a grand jury. **Streanger v. State**, 21 Ala. App. 600, 110 So. 595."

"The trial court erred in placing the defendant on trial without an indictment. (Paragraph numbered 3 at page 370)."

The case of **Collins v. State**, 218 Ala. 250, 118 So. 265, is an illustration of the application of a statute which provides for a trial in the circuit court without indictment. In that case the Act under which the defendant was being tried as quoted on page 252 of the opinion, read in part:

"the person charged shall **not** have the right to demand that a grand jury prefer an indictment for the alleged offense, except where such offense is a felony, but the prosecution may continue no matter in what court or before what judge the trial shall be had **upon the affidavit upon which it was originally begun.**" (Underscoring supplied.)

It is therefore not a denial of due process of law for a statute to make such a provision in reference to misdemeanors. However, in the absence of such a provision, an indictment is required. The opinion addressed to Hon. W. H. Quillin, Solicitor Law and Equity Court, Russellville, Alabama, dated March 26, 1929, and found on page 241 of the 1928-30 Biennial Report of the Attorney General, is hereby modified to conform to this opinion.

In the prosecution of each case, you should therefore examine the statute under which the prosecution is brought. For your information, in reference to the offenses set forth in "Rules of the Road", Article II of an Act approved August 23, 1932, (1932 Act at page 363), no provision is made for trial without indictment, and therefore, if the defendant demands a jury trial, in a Justice of Peace Court, his case should be referred to the Grand Jury.

I call your attention to a Local Act affecting Madison County, which provides that the prosecution of misdemeanors may be begun by affidavit "made before the Clerk of the Circuit Court of Madison County," and that thereupon the jurisdiction of the Circuit Court of Madison County shall attach, and the same shall proceed to trial and judgment under the same rules and procedure as provided by law in misdemeanor causes. (1919 Local Acts, p. 17.)

Under this act, the Clerk of the Circuit Court of Madison County has vested in him "power of a judicial nature" to issue warrant as to misdemeanors (*Collins v. State*, supra,) and in such cases, indictment is not necessary.

This however, is not the situation which you mention in your inquiry. Under the circumstances detailed by you, the prosecution is begun before a justice of the peace and therefore, the provisions of the Local Act do not apply. *Jones v. The State*, 149 Ala. 63, 43 So. 28.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. J. N. Baker,
Department of Public Health,
Montgomery, Alabama.

Rabies—

1. Owner of dog who does not comply with Sec. 3, Act No. 200, General Acts 1936-37, page 230 (requiring owner to inoculate dog unless confined in an enclosure, on a leash, or muzzled at all times) is liable to conviction under Sec. 12 of said Act.

2. Person, other than one authorized by Sec. 3, who inoculates dog is not liable under Sec. 12.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of July 19th which is as follows:

"Your opinion is sought regarding the two following queries coming to this office from county rabies inspectors in the matter of enforcement of the law for the control of rabies in Alabama and enacted by the last extra session of the Legislature (No. 200- S. 71 Walton):

"1. Is the owner of a dog who does not comply with Section 3 of the Rabies Bill and fails to have his dog inoculated, or confined at all times in an enclosure on his premises, or on leash, or muzzled, liable to conviction under Section 12?

"2. Is one who is not a licensed veterinarian, nor a deputy rabies inspector, nor one possessing any authority from the county board of health to inoculate dogs and who provides himself with syringe and vaccine and inoculates dogs in his community, liable to prosecution and the penalties provided in Section 12?

"A prompt reply will be appreciated."

I am of the opinion that your first inquiry should be answered in the affirmative. Section 3 of Act No. 200, General Acts 1936-37, page 230 specifically provides:

" every owner of a dog, not confined at all times to an enclosed area, or on a leash, or muzzled, shall cause such a dog to be inoculated against rabies by the Rabies Inspector, by a competent veterinarian, or other person duly qualified by the respective county boards of health."

Section 12 of the same Act provides as follows:

"Section 12. GENERAL PROVISIONS. Any person violating or aiding in or abetting the violation of any provision of this Act, or counterfeiting or forging any certificate, permit, or tag, or making any misrepresentation in regard to any matter prescribed by this Act, or resisting, obstructing, or impeding any authorized officer in enforcing this Act shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than one nor more than ten dollars, and, for the purpose of enforcing this section any court of competent jurisdiction, including Justice of the Peace Court, shall have jurisdiction in such offences."

Section 3 contains a mandatory provision for each owner to inoculate his dog if it is running at large, and Section 12 defines as a misdemeanor the failure of an owner to comply with said provision.

In reply to your second inquiry, I am of the opinion that a person who does not come within the classifications set out in Section 3, yet who inoculates dogs against rabies, is not liable under Section 12 of the Act referred to above. As far as I can find, there is no provision prohibiting anyone from inoculating a dog. Of course, an inoculation by a person other than the "Rabies Inspector, a competent veterinarian, or other person duly qualified by the respective county boards of health" is not a compliance with Section 3 of the Act and the owner of the dog is liable under Section 12. It is my opinion, however, that the person who actually inoculates the dog is not guilty of any offense unless he holds himself out as a person duly qualified to inoculate dogs as required by law. Then, of course, such a person comes under the provision set out in Section 12 which is as follows:

"Any person . . . making misrepresentation in regard to any matter prescribed by this Act . . . shall be guilty of a misdemeanor . . ."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. J. D. Sexton, Clerk,
Circuit Court, Marion County,
Hamilton, Alabama.

1. Clerk of the County Court who acts as Clerk of the Judge of the County Court when sitting as Committing Magistrate, is entitled to his fee of two dollars, even though the act giving such fee was passed after he assumed office.

2. The fee of two dollars provided for where the clerk of the county court acts as clerk of the Judge of County Court sitting as a Committing Magistrate cannot become a claim against the Fine and Forfeiture Fund of the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 22, 1937, in which you request my opinion as follows:

"At Special Session, 1936-1937 House Bill 71—(Merrill) Senate No. 225 was enacted by the Legislature. This act became effective upon its approval by the Governor as of March 2, 1937.

"Under the terms of this act the Clerk of County Court shall act as clerk to Committing Magistrate in committing proceedings in criminal cases.

"Further, the clerk of the County Court shall be entitled to a fee of two dollars in cases where the defendant is subsequently convicted and sentenced to the penitentiary or to hard labor and this fee is to be taxed in cost bill and paid by the Convict Department.

"Question 1.—Will a clerk of County Court who serves in committing proceedings, and who is in all respects qualified to receive fee of \$2.00 in such committing proceedings be entitled to the fee in mid-term, or would the provision of our Constitution with reference to increasing compensation while in office prevent such clerk claiming this fee?

"Question 2.—Will this fee of two dollars be a claim against the Fine & Forfeiture Fund of the County in cases in which the defendant is not convicted, and such other claims as are outlined in Section 4039, Code of 1923, as amended Acts of 1927, page 45?"

Answering your first request, I am of the opinion, you, even though this bill was passed and became a law after your term began, would be entitled to this fee in preliminary matters which come before the Judge of the county court sitting as a Committing Magistrate. This Act, while it increased your compensation, at the same time, it adds additional duties on the clerks of the County Court and is not repugnant to Section 281, Constitution of Alabama, 1891. *Taylor v. Davis*, 212 Ala. 282; *Jackson v. Sherill*, 207 Ala. 245.

Answering your second request, I am of the opinion this fee of two dollars allowed the clerk of the county court for acting as clerk of the Judge of the county court in sitting as a Committing Magistrate is paid as all other costs in preliminary hearings. That is, that this particular fee is paid under the provisions of Section 3755, Code of Alabama, 1923, which is as follows:

"Section 3755. Costs and fees in preliminary trials.—Whenever a defendant is convicted and sentenced to the penitentiary, or to hard labor, the costs of the committing magistrate and constable on preliminary trial, both together, not to exceed ten dollars, and the fees of the state's witnesses before the committing magistrate, not to exceed ten dollars, shall be taxed in the bill of costs in the same manner, and paid out of the same fund, at the same time and in the same way, as is provided by law for the payment of other items of costs incurred by the state; but the committing magistrate shall receive no pay unless he reduces to writing the evidence taken on the preliminary trial, as required by law."

This fee becomes a part of the ten dollar preliminary costs as provided above, but this is only paid on conviction. Then again, if the defendant is sentenced to the penitentiary on a hard labor, then under Section 3667, Code of Alabama, 1923, this fee is reduced and the State only pays five dollars—and the clerk will get only his proportionate share. Of course, if the defendant pays the fine and costs or confesses judgment for same, then the preliminary costs would be paid in full and would be ten dollars. Therefore, this fee or any other preliminary costs, that is, costs accruing on preliminary examination, can never be paid out of the fine and forfeiture fund of the county, for the reason this preliminary cost as shown by Section 3755, *supra*, is never paid except on conviction, and where there is a conviction, then the defendant becomes responsible for same and it does not fall under the provisions of Section 4039 as amended by an Act approved February 18, 1937, General Acts, 1927, p. 45.

You will note the Act above referred to, which was approved March 2, 1937, General and Local Acts, Special Session of 1936-37, p. 268, reads as follows:

"Section 1. In all criminal cases where the Judge of the County Court shall sit as committing Magistrate, the Clerk of the County Court shall act as Clerk to such committing Magistrate in said proceedings, and when the defendant is subsequently convicted and sentenced to the penitentiary or to hard labor, the Clerk of the County Court shall be entitled to a fee of Two Dollars to be taxed in the bill of costs in the same manner and paid out of the same fund, at the same time and in the same way as is provided by law for the payment of other items of costs incurred by the State."

It is evident from the above that it has reference to costs provided for in preliminary examinations which costs are set out by Section 3755, *supra*.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

Hon. Wm. O. Baldwin, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

September 16, 1937.

Alcoholic Beverages—

Malt or brewed beverages manufactured or brewed in Alabama may be sold direct to the retailer by the manufacturer or brewer without necessity of intermediate sale to distributor or wholesaler.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 13, 1937, in which you request my opinion as follows:

"A group of Alabama business men is considering establishing a brewery within the State, but before proceeding further they have asked the Alabama Alcoholic Beverage Control Board to ascertain:

"Question 1: May a manufacturer of malt or brewed beverages, in Alabama, sell directly to the retailer, thereby eliminating distributors and/or wholesalers?"

In answer to your inquiry, I respectfully refer you to Section 23 (a) of the Alabama Beverage Control Act, the proviso in which said sections clearly gives a manufacturer operating a brewery in the State of Alabama the right to sell the malt or brewed beverages manufactured or brewed in the said State of Alabama directly to the retailer without necessity of resorting to distributors or wholesalers. Said section is as follows:

"Section 23. (a) Sales by Manufacturer: Minimum Quantities.—No manufacturer shall sell any malt or brewed beverages direct to any retailer or for consumption on the premises where sold, nor sell or deliver any such malt or brewed beverages in other than original containers, approved as to capacity by the Board, nor shall any manufacturer maintain or operate within the State any place or places, other than the place or places covered by his or its license where malt or brewed beverages are sold or where orders are taken. **Provided, however, that malt or brewed beverages manufactured or brewed in Alabama may be sold direct to the retailer by the manufacturer or brewer.**" (Emphasis supplied).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. E. Clyde Hudson,
Tax Assessor,
Blount County,
Oneonta, Alabama.

Taxation—Homestead exemptions—

1. Married woman who owns homestead may claim exemption from taxes.
2. Widow may claim exemption from taxes on deceased husband's homestead which she occupies as such.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinions as follows:

"Please advise me in the following cases:

"1. A man living on a farm, and cultivating the same as a support for himself and family, the farm being assessed as a homestead in the name of the wife; is this farm subject to an exemption if so must the wife claim the exemption?

"2. A widow living on the old homestead formerly occupied by her and her husband before his death, but having the farm rented out, and depending on the proceeds for support, would she be entitled to homestead exemption?

"3. A man having 17 acres of land at the time of assessing October 1st, 1936, with no building, but later in the fall erected a building on this tract of land, and farmed the same living in the newly built home. Would he be entitled to exemption?"

Your first question heretofore has been answered by an opinion of this office, addressed to the Tax Assessor of Dale County, Alabama, under date of August 10, 1937, a copy of which is transmitted herewith. You are referred to that portion of said opinion lettered (h).

Your second question has also been answered by the said opinion. Please see that part thereof lettered (d).

The facts submitted in your third inquiry are insufficient upon which to predicate an opinion. If, as of October 1, 1936, the 17 acre tract constituted no part of the homestead of the taxpayer, the fact that after October 1, 1936, he constructed a house thereon and occupied same as his homestead would not entitle the taxpayer to homestead exemption from taxes accruing October 1, 1936 and payable October 1, 1937. Of course, if the 17 acre tract was, as of October 1, 1936, a part of the homestead of the taxpayer, the fact that he constructed a house thereon and occupied that particular house as his homestead would not change the status of the property as exempt from taxation under the "Homestead Tax Exemption Act."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. Wm. O. Baldwin, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—Manufacturer may pay for radio advertising of manufactured beverage, and announcement of name and address of retail dispenser of such product does not constitute a violation of Section 25(9) or Section 25(10) of the Alabama Beverage Control Act.

2. It is a violation of Section 25(9) and Section 25(10) of the Alabama Beverage Control Act for a manufacturer to pay for radio advertising of distributor or retail dispenser.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of August 14, 1937, in which you request my opinion as follows:

"We are today in receipt of a letter from a beer distributing company, in Birmingham, Alabama, copy of which is enclosed herewith, together with one of the 'radio forms' on which its program is based.

"While the inquiry from the distributing company does not state that the radio program is paid for by the manufacturer, I assume that it is—otherwise, there would be no question of its legality involved.

"Question 1: Is it violative of Section 25(9) of the Alabama Beverage Control Act for a manufacturer to pay for radio advertising for an establishment where malt or brewed beverages are licensed for sale by a distributor?

"Question 2: Is it violative of Section 25(10) of the Alabama Beverage Control Act for an establishment where malt or brewed beverages are licensed for sale by a distributor to permit a manufacturer to pay for radio advertising?"

From the exhibits attached to your letter, it appears that a duly licensed distributor is putting on a radio program daily advertising a brand of beer. In connection with such programs, the distributor furnishes to the radio station a form of announcement to be read out during the course of the program. In brief, this announcement gives the name and address of the cafe and the name of the cafe owner. It recites that the cafe features a particular food item and also features and recommends the beer in question. The musical number is then announced as being played at the request of that particular cafe owner.

It also appears that 18 retail purchasers from the distributing company have their names placed on the program nightly. It does not appear that the dealer has to buy any specified number of cases of beer, but such program is part of a scheme of "dealer cooperation". It is fair to assume that if a dealer does not purchase or sell a sufficient number of the particular beer, his name will not be announced on the distributing company's program.

Section 25(9) of the Alabama Beverage Control Act provides as follows:

"Excepting as hereinafter provided, no manufacturer shall in any wise be interested, either directly or indirectly, in the ownership or leasehold of any property, or any mortgage lien against the same, for which a distributor's or wholesaler's license is granted, nor shall a manufacturer, either directly or indirectly, lend any moneys, credit or their equivalent to any distributor or wholesaler in equipping, fitting out, or maintaining and conducting, either in whole or in part, an establishment or business where vinous and/or malt or brewed beverages are licensed for sale by a distributor or wholesaler, excepting only the usual credits allowed for the return of packages or containers in which vinous and/or malt or brewed beverages were originally packed for the market by the manufacturer."

Section 25(10) provides:

"No distributor, wholesaler or retail dispenser shall in any wise, either directly or indirectly, receive any credit, loan, moneys, or the equivalent thereof from any other licensee, or from or through a subsidi-

any or affiliate of another licensee or from any firm, association or corporation, except banking institution in which another licensee or any officer, director or firm member of another licensee has a substantial interest or exercises a control of its business policy for equipping, fitting out, payment of license fee, maintaining and conducting, either in whole or in part, an establishment or business operated under a distributor's, wholesaler's or retail dispenser's license, excepting only the usual and customary credits allowed for the return of packages or containers in which vinous and/or malt or brewed beverages were packed for the market by the manufacturer."

The prohibition of these sections which may be here involved is against a manufacturer, either directly or indirectly, lending any moneys, credit or their equivalent to any distributor or wholesaler in equipping, fitting out or maintaining and conducting either in whole or in part an establishment or business where vinous and/or malt or brewed beverages are licensed for sale by a distributor or wholesaler. From the facts set out in your letter and the exhibits thereto attached, it does not appear that the manufacturer is either directly or indirectly lending any moneys, credit or their equivalent to any distributor in equipping, fitting out, maintaining or conducting any establishment. The primary purpose of the radio program in question is the advertisement of the particular brand of beer. If, in the announcements of said program, the names and addresses of the retail dispensers are given, in my opinion this is a mere incident to the primary purpose of the program and does not constitute a violation of the Alabama Beverage Control Act.

The particular questions asked in your letter are somewhat broader than those involved in the exhibits to your letter. Under your first question there is involved the right of a manufacturer in any and all circumstances to pay for radio advertising for an establishment where malt or brewed beverages are licensed for sale by a distributor. As stated above, the particular radio program in question does not constitute the lending of moneys, credit or their equivalent, as prohibited by Section 25(9) of the Alabama Beverage Control Act. If, however, the program was solely an advertisement for the distributor or for the retail dispenser, in my opinion the payment for such program by the manufacturer would constitute the lending of credit or its equivalent as prohibited by Section 25(9).

Your second question is also broader than the question raised by the exhibits and the facts as to the particular program involved. Under Section 25 (10) no distributor, wholesaler, or retail dispenser shall, either directly or indirectly, receive any credit, loan, moneys or the equivalent thereof from any other licensee. I do not construe the facts set out in the exhibits to your letter as constituting the receipt of credit loans, moneys or the equivalent thereof. However, in my opinion, it would constitute a violation of said section for an establishment where malt or brewed beverages are licensed for sale to receive credit, moneys or the equivalent thereof in the form of radio advertising if such advertising is solely of the establishment.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Judge of Probate or Chairman of Board of Revenue, and not board itself, is authorized to employ assistants under Sections 8 and 8-½ of the County Financial Control Act.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your inquiry of July 15, 1937, as follows:

"Please refer to County Financial Control Act, Acts 1935, page 803, Sections 8 and 8-½ as follows:

"1. After an appropriation for compensation for the work of keeping this record is provided, who has the authority to hire a Clerk to keep such record? The Chairman of the Board or the Board as a body?"

Section 8 of the County Financial Control Act to which you refer provides that the Board of Revenue shall provide for a record of the financial status of the county. Section 8½ of said Act reads as follows:

"SECTION 8-½.—WHO SHALL KEEP SUCH RECORD. The record provided for in the next preceding section shall be under direction of the Judge of Probate, or the Chairman of the Board, whose duty it shall be to keep this record up to date at all times, and to perform any other duties with reference to accounting, auditing claims, issuing warrants, and supplying such Board with information, as they may deem necessary for the administration of the financial affairs of the County; provided that the Board of Revenue, Court of County Commissioners, or other governing body shall provide for the payment of reasonable compensation for the work of keeping this record."

This Act specifically provides that it shall be the duty of the Judge of Probate or Chairman of the Board to keep the record. I am of the opinion that the Judge of Probate or Chairman of the Board is authorized to hire whatever help is needed for this work. The responsibility is on the Judge of Probate or the Chairman of the Board to do the work and I am of the opinion that in the absence of a provision to the contrary, the Legislature intended that he and not the Board of Revenue shall have authority to hire an assistant.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 16, 1937

Hon. J. A. Carnley,
Probate Judge, Coffee County,
Elba, Alabama.

Counties—Amount due Fred Folsom under Local Act, 1931, p. 193, (a relief bill) is not barred by the statute of limitations and may now be paid by issuance of interest bearing refunding warrants or out of available funds not otherwise appropriated.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of August 16, 1937, which is as follows:

"I wish to request your opinion on the following question: Can the County issue an interest bearing warrant for a claim in favor of Mr. Fred Folsom, former Tax Collector of Coffee County, for \$667.22, which claim was made a legal charge against Coffee County by a local act of the Legislature of 1931, but was not filed with the Court of County Commissioners for collection until the Act was construed by the Attorney General on May 8, 1936, and later presented to the Court of County Commissioners, namely on May 25, 1936. Under the Financial Control Act of 1935, this claim was not filed for refunding purposes. It was not included as an outstanding claim as on October 1, 1935, and not registered with the County Treasurer by April 1, 1936.

"1. Is this claim barred by the statute of limitations?

"2. If valid now against the County, has the Court of County Commissioners authority to issue an interest bearing refunding warrant for the claim?

"3. Could the County legally pay from available funds, or funds in the County Depository not otherwise appropriated?

"Will thank you for your opinion in this matter."

The act in question for the relief of Fred Folsom (Local Acts 1931, page 193) has been held valid. Quarterly Report of the Attorney General, Vol. III, page 101.

I am of the opinion that your first inquiry should be answered in the negative. The provision of Section 10 of the County Financial Control Act (General Acts 1935, page 803) is applicable only to the registration of warrants and certificates which were issued by the county. In the instant case, there was no warrant or certificate issued that could be registered, therefore, same could not come within the provision of Section 10, *supra*. It is not such a claim that requires the audit and approval of the county governing body and need not be presented within one year under Section 228, Code of 1923. Quarterly Report of Attorney General, Vol. IV, page 25.

I am of the opinion that your second inquiry should be answered in the affirmative. The claim in question had accrued against the county at the time of the passage of the act, that is, July 17, 1931. In other words, same was an outstanding obligation against the county prior to October 1, 1935. Under the provisions of the Financial Control Act claims against the county, outstanding as of October 1, 1935, are subject to refund under the provisions

thereof and interest bearing warrants could be issued accordingly. Quarterly Report of Attorney General, Vol. II, page 138. The fact that the claim had not been put in the form of a warrant is immaterial as outstanding claims, whether in the form of warrants or not, may be paid by the issuance of refunding warrants. Quarterly Report of Attorney General, Vol. I, page 178.

I am of the opinion that your third inquiry should be answered in the affirmative provided the obligations of the present fiscal year have been met and there is a surplus out of which outstanding claims of former fiscal years can be paid. Since the obligation in question is a legal claim against the county, same may be paid from funds not otherwise appropriated if there be sufficient funds to meet the obligations of the current fiscal year. Payment in this manner would obviate the necessity of issuing refunding warrants.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. R. H. Williams,
Judge of Probate,
Marshall County,
Guntersville, Alabama.

Alabama Luxury Tax Act--

Proceeds of luxury tax divided among the counties may not be used or appropriated for an Agricultural Fair.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of August 7, 1937, in which you request my opinion as follows:

"I will thank you to advise me whether the Court of County Commissioners of Marshall County can appropriate money from the Sales tax for the Arab Agricultural Fair under Section 6755 of the Code or under any other authority of law.

"I will appreciate a prompt reply to this as these people are asking us for an appropriation to assist them in advertising the agricultural possibilities of this county."

Section 21 of the Luxury Tax Act, Act No. 126, Special Session, 1936-37, provides:

" * * * and one-half of said proceeds shall be divided or distributed equally among the sixty-seven counties; provided that the funds divided and distributed to the several counties of the State as hereinabove provided for shall be used exclusively for full-time health service in cooperation with the State Board of Health and/or the Federal Government; for public welfare in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension services in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State."

This office, in an opinion to the Hon. P. C. Black, Judge of Probate, Geneva County, dated April 27, 1937, ruled that the proceeds of the Sales Tax distributed among the counties could not be used for other purposes than full time health service, public welfare and Agricultural Extension Service in co-operation with the Alabama Agricultural Extension Service and/or the Federal Government and that the words "at the discretion of the Commissioners' Court" did not enlarge the purposes for which these funds might be used.

Since it does not appear that the appropriation in question for the Arab Agricultural Fair is an appropriation either for full time health service, for Public Welfare or for Extension Service as required by the Act, in my opinion the Court of County Commissioners may not appropriate any portion of the proceeds of the Sales Tax to such Agricultural Fair. I express no opinion as to the right of such Court of County Commissioners to appropriate money for such purpose from other funds.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. John M. Graham,
Tax Assessor,
Jackson County,
Scottsboro, Alabama.

Homestead Exemption Act—

Where homestead is willed to widow, the fact that property has been assessed to the estate of the deceased would not bar right of such widow to homestead exemption.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of August 17, 1937, in which you request my opinion as follows:

"I have an application for Homestead Exemption as follows:

"J. D. Snodgrass, deceased, willed all of his property to his widow, who lives in the home, at the same time he made his son, Captain Jno. M. Snodgrass, Executor. The Homestead is of course assessed in the name of J. D. Snodgrass Estate. Captain Jno. M. Snodgrass has applied for Homestead Exemption for her. What shall I do in this case?"

As I understand your letter the property was willed to the widow but has been assessed in the name of the J. D. Snodgrass Estate. In the opinion of this office to Hon. T. D. Woodham, dated August 10, 1937, Headnote (f) it was held that the fact that the property was erroneously assessed would not affect the right of the true owner to exemption from taxation. In my opinion, therefore, such widow is entitled to the homestead exemption under the facts set out in your letter.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. J. Elmore McAdory,
Deputy Tax Assessor,
Jefferson County, Bessemer Div.,
Bessemer, Alabama.

Taxation—Homestead Exemption—Act 107, General Acts of 1936-37, p. 113.

1. A minor child owning house and lot, where he resides with his parents as a homestead, and neither parent owning any property, the parent of said minor child, as head of the family, is entitled to claim homestead exemption on behalf of said minor.

2. Homestead exemption law has independent application apart from the statutes pertaining to the exemption of homestead from levy and sale under process, and exemption of homestead in favor of widow and minor children.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"1. 'A' owns a vacant lot in the City of Bessemer which he cultivates, raising vegetables of various kinds for the use and benefit of his family. He does not own any other property of any kind. He lives in a rented house. Would this person be entitled to the exemption allowed on a homestead?

"2. 'A' owns a house and lot in the City of Bessemer. He also owns a vacant lot situated in a different block than that on which his homestead is located, on which he has a garden, raising vegetables for use and benefit of his family. The total assessed value of both pieces is less than \$2000.00. Would he be entitled to the homestead exemption on both lots, or on the lot on which his dwelling house is located?

"3. A minor child owns a house and lot which is being used by himself and parents as a home. Neither of the parents own any interest of any kind in any other property. Would the parents or this minor child be entitled to the Homestead exemption allowed under the recent Acts of the Legislature?

"4. 'A' owned two houses and lots at the time of his death. He did not leave any will. There are surviving him a widow and several minor children who reside in one of these houses. The widow holds only a right to use the property during her life-time with actual title in the minor children. Can the mother of these children claim the exemption allowed under the Homestead Exemption Law?

"5. Under this Homestead Exemption Law, would the Statutes and Laws pertaining to the exemption from levy and execution govern, or would the law pertaining to homestead exemptions to the widow and minor children, either or both, govern in arriving at what exemption, if any, a person would be entitled.

"6. 'A' owns a house and lot in the City. On the rear end of this lot he has a small house which at one time was used as a servant's home. He now rents the same to a tenant. The whole of the value of this

lot and all improvements are less than \$2000.00. What exemption would be allowed under the Homestead Exemption Act passed by the recent Legislature?

"7. 'A' purchases a piece of property under lease sale contract. The seller carries this property in his assessment, charging the taxes to the purchaser. Can the purchaser claim this as his homestead and thereby reduce the amount of taxes which the seller would pay and in turn reduce the amount the purchaser would reimburse to the seller?"

In my opinion your third question should be answered to the effect that the parent of a minor child, as head of the family, would be entitled to claim the homestead exemption on behalf of said minor, where said child owns the house and lot in which he resides with his parents, who own no property of any kind. Section Three of the Homestead Exemption Act, approved February 20th, 1937, General and Local Acts of Alabama, Extra Session 1936-37, page 113, appears to limit the right to claim exemption to the head of the family, but by reading the Act in its entirety, together with the Constitution and Laws of Alabama, pertaining to homesteads, it will be seen that the Legislature intended that the Act should have a broader application in its scope than Section 3 alone would imply. **Sec. 7882, Code of Alabama of 1923; 77 So. 406; 6 So. 383.**

In answer to your fifth question, in my opinion the New Homestead Exemption Law, which is the question we are now dealing with, has its independent application, apart from the statutes pertaining to the exemptions of homesteads from levy and sale under process, and the exemptions of homesteads in favor of widows and minor children. Neither of said statutes governs the application of the Act in question, but when considered along with the Act tends to broaden its scope and its meaning. **Section 205 Constitution of Alabama; Sections 7882 and 7918 of the Code of 1923.**

With reference to questions 1, 2 and 4, I respectfully refer you to an opinion of this office addressed to Mr. T. D. Woodham, Ozark, Alabama, dated August 10, 1937. Syllabus (a) (b) and (d) respectively answer your questions 1, 2 and 4.

For answer to question 6 in your letter, you are referred to an opinion of this office to Mr. McAdory, Deputy Tax Assessor, Bessemer, Alabama, dated August 12, 1937. With reference to question 7, which you propound, please refer to an opinion of this office to Mr. Roy Johnson, Tax Assessor, Birmingham, Alabama, dated April 27, 1937. Copies of these opinions are enclosed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 17, 1937.

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Constitutionality—

Section 3 of Act No. 227, House Bill 88, approved March 1, 1937, (General Acts, 1936-37, p. 270), amending 1931 Act relative to guard-

ianship of incompetent veterans and minors of disabled or deceased veterans is not violative of Section 104 (9) of the Constitution of 1901.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Kindly refer to House Bill No. 88, special Session 1936-37, approved March 1, 1937, Section 3, in which Section 9-A is added and provided that in partial settlements of incompetent veterans and minor children of disabled veterans the costs and fees, exclusive of Guardian ad Litem, should be limited to not more than one-half of one percent of the amount of money received by the Guardian since his last settlement. Please advise if this Section is or is not constitutional with reference principally to Section 104, sub-section 9 of the Constitution."

In answer to your inquiry I am of the opinion the act does not violate Section 104 (9) of the Constitution of 1901.

Section 104 of the Constitution provides as follows:

"104. The legislature shall not pass a special private, or local law in any of the following cases: * * *

"(9) Exempting any individual, private corporation, or association from the operation of any general law; * * *

The 1937 Act, (General Acts, 1936-37, page 207) is an amendment in part of the 1931 Act (General Acts, 1931, page 280) relative to the guardianship of incompetent veterans and minor children of disabled and deceased veterans. The original Act is a general Act dealing with the subject matter in question and is not a special, private or local law. This is likewise true of the 1937 amendment. Section 3 of the 1937 Act is an amendment of the 1931 Act, by adding Section 9 (a) thereto. It merely deals with the amount of fees chargeable on certain settlements and is no wise a special, private or local law. It is applicable generally throughout the State and applies equally to all counties of the State. It may be true that it provides a different schedule of fees in the case of veterans than in other cases, but this, in my opinion, is a legitimate classification reasonably related to the purpose to be effected. **Reynolds v. Collier**, 204 Ala. 38, 85 So. 65.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 18, 1937

Hon. Elmer L. Vinson,
Tax Collector,
Limestone County,
Athens, Alabama.

Qualified electors—Poll tax and registration—

1. Persons who owe back poll tax which they pay between October 1st of a given year and the time of the general election held in that year are not entitled to vote in said election.

2. Persons who have become twenty-one years of age since the primary election and have regularly registered are entitled to vote in the general election held in a given year.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter as follows:

"We have several persons who are one or more years behind with their poll tax and are left off the qualified voting list in the Probate Office and did not vote in the Primary election. If they will pay up all back poll tax between now and November 3, will they be in a position to vote in the General Election?"

"Also some have become twenty one since the Primary and registered in the regular manner and paid poll tax. Could the Probate Judge issue a certificate to these persons to present to the election official in order that they may vote?"

"Would appreciate an early reply as we have some who do not want to pay back poll tax unless they can vote in the General Election."

In reply, I advise that persons who owe back poll tax and pay the same between October 1st of a given year and the time of the holding of the General Election are not entitled to vote in said election. This office, in an opinion addressed to Hon. L. W. Price, Judge of Probate, Conecuh County, Evergreen, Alabama, under date of November 29, 1935 (Quarterly Report of Attorney General, Vol. 1, page 249) held that a person who paid back poll tax subsequent to February 1st of a given year was not entitled to vote in any election held between February 1st of that year and February 1st of the next succeeding year. Therefore, when a person who pays back poll tax between October first of a given year and the time of the holding of the General Election in that year would not be entitled to vote in said election. I enclose herewith for your information copy of the opinion to Judge Price above cited.

As to persons who have become twenty-one years of age since the primary election and have regularly registered, it is my opinion that such persons are entitled to vote in the General Election to be held in that year. Act No. 155, General Acts 1936 at page 174, approved April 21st, 1936, provided for additional registration periods in July of each year in all counties in the State in a certain population classification. Your county comes within this population classification. The last sentence of Section 1 of this Act reads as follows:

"Any voters who may become qualified after a qualified voting list has been made and published as now provided for by law during even numbered years may be added to the list of qualified voters by a supplementary list or lists without making a complete new list of qualified voters."

This act could serve no useful purpose unless it gave to persons who become twenty-one years of age after the regular registration period the right to register and thereby become eligible to vote in the General Election. A person who becomes twenty-one years of age after October 1st of a given year becomes eligible to vote, without the payment of poll tax, immediately upon his registration, provided he is not otherwise disqualified. Such a person owes no poll tax until October 1st of the year following. See opinion to Hon. L. W. Price, *supra*, and opinion to Hon. Wm. W. Hill, Judge of

Probate, Montgomery County, Montgomery, Alabama, under date of March 3, 1936, (Quarterly Report of Attorney General, Vol. II, at page 251.)

In your letter of inquiry you state that these persons who have become twenty-one since the primary have registered in the regular manner and paid poll tax. I presume that the poll tax there referred to by you as having been paid was the poll tax which these persons became liable for on October 1st, since they were not due any poll tax prior to that time. You will note from the opinions above cited that when a person pays the poll tax which he is due on October 1st of a given year at any time between that date and February 1st of the following year that the payment of said poll tax gives him the right to vote in any election held between that February 1st and February 1st of the next succeeding year. So it can be clearly seen that a person who has become twenty-one years of age since the primary in any given year and registered in the regular manner is entitled to vote in the general election held in that year whether he pays the poll tax which becomes due on October 1st of that year or not.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 18, 1937

Hon. G. C. Grantham, Clerk,
Circuit Court, Geneva County,
Geneva, Alabama.

1. It is the duty of the clerk to issue the alias warrant after the presiding judge has made order for same.

2. There is no trial tax in the County Court as is provided by Section 5, Revenue Laws of Alabama, 1936, p. 10, but you may charge a fee of \$5.00 for trial and entering judgment under Section 3758, Code of 1923.

3. The Clerk of the County Court is entitled to a continuance fee.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 6, 1937, in which you request my opinion as follows:

"In case of a conditional forfeiture and alias ordered by the Judge of the County Court, whose duty is it to issue the alias warrant? Does the Judge of the Court have to make this order before he himself can issue this alias warrant? Since the clerk of the Circuit Court is ex-officio clerk of the County Court, clothed with the same powers as such clerk, is he required, under an order from the court to issue alias for the arrest of the defendant as in the Circuit Court?

"What is the proper trial tax to charge in the County Court? It has been my custom to charge \$5.00 and if the warrant is issued by the judge, I charge an additional \$1.00 for this, but Section 6656, Code of 1907 does not seem to justify me in this.

"Why should the County and also the clerk be entitled to a continuance fee in County Court? It appears to me that this is a double charge against the defendant for one and the same act performed and I doubt that the defendant could be forced to pay this double fee if it was tested.

"What is the proper charge for making the record for Court of Appeals or Supreme Court on appeal from a conviction in the Circuit Court? Is the office copy of the transcript or record for court of Appeals or Supreme Court part of the clerk's fees for making the transcript or record for the Higher Courts? See Acts 1915, page 336 and Code 1923 section 6108. It is possible that you have already passed on these questions, but I have failed to find your ruling. Thanking you for giving me the above desired information, and for your past courteous and prompt action, and wishing you continued success as Attorney General of Alabama, I am"

Answering your first request, it is your duty to issue the alias warrant. The Judge makes the order for forfeiting bond against the defendant and bail, and orders alias capias which you issue in compliance with such order. The same rule applies in the County Court as in the Circuit Court as you are ex officio clerk of the County Court clothed with all the duties with which you are clothed as clerk of the Circuit Court.

Answering your second request, I do not understand what you refer to where you say trial tax in the County Court. If you have reference to the trial tax provided by Section 9, Revenue Laws of Alabama, 1936, p. 10, you are without authority to charge this in the County Court, as this applies only to cases in the Circuit Court, as can be seen by reading the section. However, if you have reference to the five dollar charge "for trial and entering judgment" as set out under Section 3758, Code of Alabama, 1923, "fees in the County Court," this is a proper charge, but this is not properly designated as trial tax.

I do not find any authority of law for taxing the one dollar fee referred to by you unless you have reference to the charge of one dollar "for taking affidavit of complaint and issuing warrant of arrest." If this is what you refer to, this is of course, a proper charge.

Answering your third inquiry, I do not understand how you come to the conclusion that two continuance fees can be charged. The schedule says very plainly "for each order of continuance, fifty cents."

Answering your fourth inquiry, I call you attention to Biennial Report of Attorney General, 1932-34, p. 370, and Quarterly Report, Vol. I, p. 99. I think these opinions answer this request fully.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 18, 1937.

Hon. Frank N. Julian,
Supt. of Insurance,
Capitol.

Gross Premiums Received—

Where a "Dividend" duly payable to the holder of a participating life policy is applied in reduction of the stated annual renewal premium due on such policy, the amount of the "Dividend" so applied is not a "premium received" within the meaning of schedules 160.4 and 160.7 of the 1935 Revenue Act the "premium received" in that particular instance being the balance of the stated annual renewal premium minus the amount of the "Dividend" credited against it.

Opinion by Assistant Attorney General Bibb.

Dear Sir:

I wish to acknowledge receipt of your letter of June 1, 1937, in reference to my opinion of August 18, 1936, Quarterly Report of Attorney General, Vol. IV, page 135, and requesting my opinion on the following further question:

"With further reference to your opinion to me dated August 18, 1936, wherein you hold that the term 'return premiums' as used in schedules 160.4 and 160.7 of Acts 1935, page 550, does not include 'savings or dividends, returned to policy holders or credited to their accounts?'"

"In enforcing the excise tax provisions involved and construed in your opinion, I find that there is considerable difference of opinion regarding the meaning of the term 'gross premiums received', which is made the basis of the tax and from which 'return premiums' is an allowable deduction. Numerous life insurance companies writing 'participating' policies contend that whenever a 'dividend' is declared to a policyholder, as provided by his contract, and upon his direction is used to reduce or to apply on payment of his renewal premiums, that portion of the renewal premium paid by the application thereto of his 'dividend' is not part of the 'premium received' by the company within the meaning of the statute; the contention being that the company only 'receives' the amount of the stated annual premium less the amount of the 'dividend' applied thereon. Apparently the decisions from courts of other states so hold.

"In view of the fact that your former opinion did not construe the term 'gross premiums received' as used in these provisions, I shall appreciate your advising me:

"1. Whether a 'dividend' declared to the holder of a participating life insurance policy and used to apply in part payment of the stated renewal premium due on his policy is to be deemed to be a part of the 'premium received' by the company, or does the 'premiums received' embrace only that balance paid by the policyholder after deducting the 'dividend' so applied?"

In answer to your question, let me say that the issues involved have never been passed upon by our Supreme Court. The courts of many other

states, however, have passed upon the question under statutes in many instances essentially the same as ours. While the available decisions are not all in accord, the very strong preponderance of them hold that, in the instances in which the dividends actually apportioned and payable to the holder of a "participating" life policy, under the provisions of his policy entitling him to share in the "divisible surplus" of the company, are used to apply upon and to abate the annual renewal premium stated in his policy, the amount of the dividend thus credited upon his annual renewal premium is not a "premium received" by the company for the purpose of the premium tax required by the statute on "gross premiums received." **Mutual Benefit Life Insurance Co. v. Richardson**, 219 Pac. 1003 (Cal.); **State v. Jay**, 260 Pac. 180 (Wyo.); **Mutual Benefit Life Insurance Co. v. Commonwealth**, 107 S. W. 802, (Ky.); **New England Mutual Life Ins. Co. v. Reese**, 83 S. W. (2d) 238 (Tenn.); **State v. Wilson**, 172 Pac. 4 (Kan.). To the contrary: **New York Life Ins. Co. v. Burbank**, 216 N. W. 742 (Iowa).

In light of the authorities, it is my opinion that in this instance the term "gross premiums received" as used in our statute should be construed to apply to that amount of premium actually paid by the policy holder after crediting the amount of the dividend upon the annual renewal premium stated in his policy.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 18, 1937.

Hon. W. O. Baldwin, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Board—May promulgate reasonable regulations fixing expense allowance for field agents.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of August 14, 1936, requesting my opinion as follows:

"The Alabama Alcoholic Beverage Control Board has in its employ several Field Agents, Auditors, etc., who live in one section of Alabama, and from time to time are detailed to other sections of the State for periods of time. These gentlemen are allowed \$3.00 a day for their necessary living expenses.

"Question: May field employees of the Alabama Alcoholic Beverage Control Board not on duty at their legal residence, travel to their homes for week-ends or other periods and receive reimbursement for mileage traveled not to exceed the maximum daily allowance for subsistence and lodging?"

Under Section 6(h) of the Alabama Beverage Control Act, the Board is given the power to appoint officers, agents and employees and to "fix their salaries and remunerations." While there is a well recognized distinction between "salary" or "compensation" and an "allowance for expense" (Quarterly Report II, p. 161 at p. 163) in my opinion this power of the Board, with

the power to assign such agents to various duties, carries with it the power of the Board to promulgate reasonable regulations for travel and living expense of such field agents while engaged in their official duties.

Ordinarily an expense account of a State employee should only include just such items as constitute his actual expenses. Biennial Report of Attorney General, 1932-34, p. 226. My understanding from you is that the Board, following a common governmental practice, has made an allowance of a flat sum of \$3.00 per diem in lieu of actual subsistence expense while on duty away from their legal residence.

In many instances, it would be less expensive to the State if these field agents returned to their homes for week-ends. In this way, such subsistence expense would not be payable. It would be unreasonable to require such field agents to return from their assigned duty to their homes at their own expense merely to save the State this subsistence expense. In my opinion, the Beverage Control Board has the power and it is the duty of the Board, to promulgate all necessary reasonable regulation of travel and subsistence expense to the end that the Board may function economically. If, in the opinion of the Board, it is reasonable to allow such field agents reimbursement for mileage travelled, not to exceed the maximum daily allowance for subsistence and lodging, in my opinion the Board may do so.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 18, 1937.

Hon. John T. Frazer,
Judge of Probate,
Lee County
Opelika, Alabama

Alabama Beverage Control Act—

1. Person illegally selling whiskey in wet county should be charged with violation of Code Section 4621, although such whiskey had been bought from a State Store and bore all proper stamps.
2. If such person is convicted, the amount of punishment is governed by Code Section 4622.
3. Sale of illicit alcoholic beverages unstamped and/or unidentified, punishable under Section 4621 of the Code of 1923 whether in wet or dry county.
4. Field agent in the employ of State Beverage Control Board entitled to mileage and per diem as witness fee.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of August 4, 1937, in which you request my opinion as follows:

"I respectfully request your opinion on the following questions relative to the Alabama Beverage Control Act.

"1. In the event a person is caught selling whiskey or any other alcoholic beverage which has been bought from a state store and bears all proper stamps etc., said sale being made in a 'wet' county, and said seller not being a licensed retailer, under what section should the warrant be issued for his arrest?

"2. In the event such warrant is issued, the case tried in County Court and the defendant found guilty, what section determines the amount of punishment the Court is authorized and empowered to impose?

"3. In the event a person is caught, in a wet county, selling illicit alcoholic beverages, moonshine, etc., upon which there is no stamp or tax, under what section should the warrant be issued and what section governs the penalty in the event he is found guilty?

"A warrant has been issued in this County, which is wet, against an individual for 'Violating the Alabama Alcoholic Beverage Control Act'. Such a warrant takes in numerous and varied violations of the Act. The person arrested is claimed to be guilty of selling whiskey which was purchased from a State store. In examining the Beverage Control Act the only penalty which may be imposed upon one guilty of such offense is that one imposed by Section 14 concerning the renewal of licenses, and since no license has been obtained in the first place and since the said person cannot qualify for a license, it seems that this section would not hold in the case in question.

"Would it have been proper to issue the warrant in this case under Section 4621 of the 1923 Code and imposed the penalty set out in Section 4622 of the 1923 Code in the event the defendant was found guilty?

"Also, is a Field Agent in the employ of the State Beverage Control Board entitled to mileage and per diem as witness fee to be paid out of the Fine & Forfeiture Fund when he attends Court to testify in such cases?"

Prior to the passage of the Alabama Beverage Control Act by the Special Session of 1936-37, the laws of Alabama prohibited altogether the selling or possessing for sale of alcoholic beverages. Under the provisions of the Alabama Beverage Control Act, certain exceptions were provided wherein it was legal to sell or possess such alcoholic beverages. The Alabama Beverage Control Act provides for the sale of whiskey by State Liquor Stores and by certain licensed hotels, clubs and restaurants. No provision is made for resale except in the case of such hotels, restaurants and clubs duly licensed. Under Sections 11 to 16 of the Beverage Control Act the sale of whiskey by anyone other than the State Liquor Stores remains prohibited, although in the Beverage Control Act no provision expressly imposes a penalty for such offense of selling whiskey legally purchased from a State Liquor Store. In my opinion, however, the prohibition laws of the State of Alabama were not repealed entirely in a wet county by the provisions of the Alabama Beverage Control Act. This act expressly repealed only those laws in conflict with the beverage Control Act. As a safeguard to promote the purposes of the act which were expressed to be "an exercise of the police power of the State of Alabama for the protection of the public welfare, health, peace and morals of the people of the State, and to prohibit forever the open saloon", it was expressly provided by Sections 6 and 51 of the Act that even in wet counties of the state certain of the prohibition laws remained in full force and effect. The statute should always be construed so as to give effect to the intention of the Legislature. Where there are two or more statutes on the same subject,

such statutes should so far as possible be construed to harmonize. Considering the previously existing prohibition laws, the terms of the Alabama Beverage Control Act and its expressed purposes, it is my opinion that the provisions of the prohibition laws and particularly 2 of Chapter 167 of the Code of Alabama of 1923, were repealed by the Alabama Beverage Control Act only insofar as there was an express conflict. It is further my opinion that the provisions of Sections 4621 and 4622 of the Code of Alabama of 1923 were not repealed by the Alabama Beverage Control Act even in a wet county, but that the effect of the Alabama Beverage Control Act is to make a specific exception from the effects of said sections in the case of the Alabama State Liquor Stores and duly licensed hotels, clubs and restaurants. In my opinion, therefore, when a person is caught selling whiskey or any other alcoholic beverage, said seller not being a licensed retailer, a warrant should be issued for his arrest for the violation of the provisions of Code Section 2641 of the Code of 1923. This should be done whether the person was illegally selling whiskey purchased from a State Liquor Store and bearing the proper stamps or whether such whiskey was illicit and unstamped alcoholic beverages. Such section would also apply in both dry or wet counties and the defendants may be prosecuted under such section in all cases involving the illegal sale or possession for sale of alcoholic beverages except in those cases where such sale or possession is specifically legalized by the Alabama Beverage Control Act. In this connection, I call your attention to the opinion to Hon. D. E. Dunn under date of July 29, 1937, in which I reached a similar conclusion as to proceedings for the confiscation of vehicles carrying prohibited liquors.

Your second question is as to what section determines the amount of punishment the court is authorized and empowered to impose. In my opinion, the penalty set out in Section 4622 of the Code of 1923 is the penalty to be imposed.

Your third question has been answered above.

In answer to your fourth question, I advise you that in my opinion a Field Agent in the employ of the State Beverage Control Board is entitled to mileage and per diem as witness fee. See Quarterly Reports of the Attorney General, Vol. VI, page 17, Vol. IV, page 23 and Vol. III, page 35.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

Hon. R. J. Westbrook,
Clerk of the Circuit Court,
Marengo County,
Linden, Alabama.

Balance of cost of conviction of felony over and above \$250.00 paid by the State may become a charge against the Fine and Forfeiture Fund of the county where execution is returned "No Property Found."

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 17, 1937, in which you request my opinion as follows:

"In a murder case, the State pays \$250.00 and where the cost exceeds this amount, I pro rate the sum of \$250.00, and I would like to know if the balance due can be registered against the fine and forfeiture fund by my endorsing amount due on said tickets."

Under Section 3668, Code of Alabama, 1923, two hundred and fifty dollars (\$250.00) is all the costs the State will pay where a person is charged with a felony and sentenced to the penitentiary. If the cost amounts to more than the amount paid by the State, then, it is my opinion there should be a judgment against the defendant for all the costs. The amount collected from the State should be credited on the judgment and the amount collected from the State should be pro rated and execution issued against the defendant for the balance. If execution is returned "No property found" then, the amount above and over \$250.00 paid by the State would become a charge against the fine and forfeiture fund of the county. Section 4039, Code of Alabama, 1923, as amended by an Act approved February 18, 1927. (General Acts 1927, page 45). The above holdings only apply to felony cases. The rule is different in hard labor cases.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

Hon. Haygood Paterson,
Sheriff, Montgomery, County,
Montgomery, Alabama.

Uniform Firearms Act—

Under the provisions of Act No. 82, S. B. 63, approved April 6, 1936, (General Acts, 1936, page 51) as amended in part by Act No. 190, H. B. 161, approved March 2, 1937, (General Acts, 1936-37, page 223) all persons except those exempt under Section 6 are required to obtain permit before carrying pistol.

Permit to carry pistol issued by Sheriff of a county to residents of that county only.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date which is as follows:

"Please at your earliest convenience give me a ruling on the following questions:

"Are railway express employees who are in charge of valuables and who are bonded, required to have permit under pistol act?

"If permits are required can supt. of company, have same issued for all employees in the State at his home office in Birmingham, Ala."

The Uniform Firearms Act was enacted by the 1936 Legislature, Act No. 82, S. B. 63, approved April 6, 1936 (General Acts, 1936, page 51). Section 5 of said Act provides:

"Section 5. **CARRYING PISTOL:** No person shall carry a pistol in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license therefor as herein-after provided."

Section 6 of said Act provides:

"Section 6. **EXCEPTION:** The provisions of the preceding section shall not apply to marshals, sheriffs, prison or jail wardens or their deputies, policemen or other law-enforcement officers, or to members of the Army, Navy or Marine Corps of the United States or of the National Guard or Organized Reserves when on duty, or to the regularly enrolled members of any organization duly authorized to purchase or receive such weapons from the United States or from this State, provided such members are at or are going to or from their places of assembly or target practice, or to officers or employees of the United States duly authorized to carry a concealed pistol, or to any person engaged in the business of manufacturing, repairing or dealing in firearms or the agent or representative of any such person having in his possession, using, or carrying a pistol in the usual or ordinary course of such business, or to any person while carrying a pistol unloaded and in a secure wrapper from the place of purchase to his home or place of business or to a place of repair or back to his home or place of business or in moving from one place of abode to another."

Unless the railroad express employees come within one of the exceptions of Section 6, *supra*, it will be necessary for them to obtain permits to carry pistols. From the information stated in your letter, it does not appear that they can come within one of the exemptions above set out.

Section 7 of the original Act was amended by Act No. 190. H. B. No. 161, approved March 2, 1937, (General Acts, 1936-37, page 223). The amended section provides as follows:

"Section 1. That Section 7 of 'an Act to regulate the sale, transfer and possession of certain types of firearms; to provide for the licensing of dealers and owners of such firearms; to fix rules of evidence in the courts of this state in prosecutions for violation of this act; to prescribe penalties for the violation of any provisions herein and to make uniform the law with reference thereto,' Approved April 6th, 1936, be amended so as to read as follows: Section 7. **ISSUE OF LICENSES TO CARRY:** The Sheriffs of a County, may upon the application of any person residing in that county issue a license to such person to carry a pistol in a vehicle or concealed on or about his person within this state for not more than one year from date of issue, if it appears that the applicant has good reason to fear an injury to his person or property, or has any other proper reason for carrying a pistol, and that he is a suitable person to be so licensed. The license shall be in triplicate, in form to be prescribed by the Secretary of State and shall bear the name, address, description, and signature of the licensee and the reason given for desiring a license. The original thereof shall be delivered to the licensee; the duplicate shall within seven days be sent by registered mail to the Secretary of State and the triplicate shall be preserved for six years, by the authority issuing said license. The fee for issuing such license shall be fifty cents (\$.50) which fee shall be paid into the County Treasury."

It will be seen from the above that the license can be issued **only by the sheriff of the county to any person residing in his county** although the permit may be good throughout the State. In other words, the sheriff of one county cannot issue a permit to a resident of another county to carry a pistol. It therefore follows that the superintendent of a company can have permits issued to its employees only by the sheriff of the county in which the respective employees reside.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

State-wide Highway Planning Survey,
Capitol,
Montgomery, Alabama.
Attention Mr. Harvey, Jr.

Governmental Agencies—

1. County Board of Health is agency of the State.
2. County Department of Public Welfare is agency of the County.
3. City and County Boards of Education are agencies of the State.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request, which is as follows:

"The Alabama State Highway Department through a State-wide Planning Survey being conducted by the State Highway Department in cooperation with the United States Bureau of Public Roads is carrying on as one of its phases of activity a Financial Survey. This phase of the State-wide Planning Survey is attempting to secure certain fiscal data on the units of government within the State, that is, the State, the counties, and the incorporated municipalities. Differences of opinion have existed among the Planning Survey authorities as to the nature of certain agencies; namely, county boards of health, county departments of public welfare, and county and city boards of education, as to whether they should be considered as local or State agencies.

"We, therefore, request an opinion from you as the Attorney General of the State of Alabama as to this question: 'Are the above mentioned agencies State or local agencies?' "

In my opinion, your inquiry should be answered as follows:

1. A County Board of Health is an independent agency of the State. Cf. *Mobile County v. Kimbell and Slaughter*, 54 Ala. 56. See *Hard v. State ex rel. Baker*, 154 So. 71, 228 Ala. 151.
2. A County Department of Public Welfare is an agency of the County. Public Welfare primarily, although not exclusively, is a county function.

Section 88, Const. of 1901. Cf. Beeland Wholesale Co. v. Kaufman, 174 So. 1546, Hn. 28, 29.

3. A County Board of Education is "a quasi corporation and constitutes in fact an independent agency of the State for the purposes enumerated * * * " in the statutes. Kimmons v. Jefferson County Board of Education, 204 Ala. 384. Cf. State v. Tuscaloosa County, 233 Ala. 611.

4. A City Board of Education is an independent agency of the State for the purpose for which it was created. The only material difference between the City Board and County Board of Education is in the territorial extent of their respective jurisdictions. See Article IX, School Code of 1927.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 20, 1937.

Hon. W. M. Mayo,
Sheriff, Clay County,
Ashland, Alabama.

Possession of alcoholic beverages in a dry county. Stamped or identified alcoholic beverages originally purchased in accordance with the Alabama Beverage Control Act and being illegally sold or kept for sale may be confiscated in accordance with the provisions of Article XI, Chapter 167, Code of Alabama, 1923.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of August 4, 1937, in which you request my opinion as follows:

"I am writing to request your official opinion as to the possession of State controlled Alcoholic Beverages in this County (Clay), which is a Dry County, and also whether such Alcoholic Beverages taken into my custody under the following conditions and after the following adjudication of charges filed for the possession and sale of same have been rendered, are contraband, or should same be returned to the one in whose possession same were found, to-wit:

"On or about July 17, 1937, clothed with a search warrant. I visited a place of business out from town some two or three miles, and out of the police jurisdiction of any town, in this County, in which place of business sandwiches and cold drinks are sold, and in connection therewith, gasoline and motor oils are also sold. This business is conducted in and around the ground floor and room of a two-story building, the two operators found at the place stating that they occupied the upper story and slept there.

"When I, in company with two Deputy Sheriffs of this County, entered the downstairs part of this building, we found therein two men who claimed to have charge of the operating of this business, also two customers were there, one of them was drinking some beer from a mug or stein and the other drinking beer from a can. This can of beer was

marked Budweiser beer and the man who had the mug or stein of beer stated that his beer was the same brand as that in the can in the other man's possession. Both these men told me that one of the operators of this business, pointing out the one named, sold them this beer, that is, one of the men bought it for both of them, he having paid him 20c per can, or a total of 40c for the two cans of beer found in their possession. This statement was made in the presence of the operator of the business named by them as the one who sold them the beer, which he did not deny so far as I heard.

"After this was done, I proceeded to execute the search warrant by searching both down stairs and upstairs, first searching downstairs, or in the portion where the sandwiches were served, etc., which room was also divided into partitions which may be termed private booths, ostensibly used for eating sandwiches, and perhaps other purposes, by the customers. In this room was an ice box or refrigerator in which I found 39 cans of beer, 19 of Pabst and 20 of Budweiser. Also, on the floor of this room, I found about six cases of beer and one broken pint of Glenmore whiskey. I then searched the upper room, or upstairs of this building and found more whiskey and beer, the total amount found, including that named above, also including all that was found downstairs and upstairs, being as follows:

"14 pts. Three Feathers; 10 pts. Old English Dry Gin; 10 Pints Maryland Hunt Cup; 7 pts. Still Brook; 1 pt. Gilsbey's Dry Gin; 1 pt. Old Forester; 1 Broken pt. Glenmore;

"Also the following beer: 19 cans Pabst; 20 cans Budweiser; 14 cases Budweiser; 4 cases Pabst.

"The person named as the operator who sold the beer by the men found with it was charged by affidavit and warrant with illegally possessing liquor, malted or brewed beverages, beer, etc., as well as charged with illegally selling same, in the number of different counts in the same complaint. He was tried in County Court yesterday on said affidavit and warrant, or complaint, and convicted as charged in said complaint. An appeal bond was filed for appeal to the Circuit Court. The defendant now requests that all of this whiskey and beer, that is, all hereinabove named and described, which was taken as above stated, be returned to him. Please give me your official opinion as to whether same, or any part thereof, should be returned to him. Also, please give me your opinion as to whether same should be returned to him should he not perfect this appeal but should pay the fine and costs imposed and afterwards demand the return of same to him, or if convicted on appeal in the same manner as the County Court, should same then be returned to him? If not returned to him, should same be confiscated by me?

"Thanking you for your official opinion on all of these questions at your earliest convenience, I am."

You do not state in your letter whether the alcoholic beverages were stamped and identified, that is, whether they were originally purchased in accordance with the provisions of the Alabama Beverage Control Act. From the fact that your request refers to "state control of alcoholic beverages" I assume that such beverages were originally purchased under the provisions of the Alabama Beverage Control Act. On July 29, 1937, this office advised Hon. D. E. Dunn that unstamped and/or unidentified alcoholic beverages were subject to confiscation only under the provisions of Sections 33, 34 and 35 of the said Act. In the same opinion this office advised Mr. Dunn that if

the alcoholic beverages were purchased in accordance with the provisions of the Alabama Beverage Control Act but illegally sold or kept for sale, all of the provisions of Article XI, Chapter 167, Code of Alabama, 1923, regulating the confiscation of contraband liquors, were in full force and effect. I enclose a copy of this opinion for your information.

On July 29, 1937, this office also advised Hon. J. Sam Cleiland, Sheriff, Clarke County, that the possession of alcoholic beverages, purchased in accordance with the provisions of the Alabama Beverage Control Act, at a filling station, cafe, or night club in a dry county is prima facie evidence that the same are possessed for sale or distribution with intent to sell or distribute the same contrary to law. In that opinion the sheriff was advised that if there was no conviction the beverages should be returned by the sheriff to the person from whom they were seized, but if there was a conviction the beverages so seized should be disposed of according to the appropriate provisions of Article XI, Chapter 167, Code of Alabama, 1923. I also enclose a copy of that opinion for your information.

In your inquiry you state that although the party in possession of alcoholic beverages has been convicted in County Court, he has filed a bond for an appeal to the Circuit Court and, pending such appeal, requests the return of the beverages. In my opinion you should not return said beverages pending the disposition of the case or bill. Should he not perfect his appeal or if convicted on appeal, then in accordance with the opinion to Hon. Sam J. Cleiland, said beverages should be disposed of in accordance with Article XI, Chapter 167, Code of Alabama, 1923. I particularly call your attention to the following provisions of that Article:

"Section 4740. * * * In all criminal prosecutions against any person for violating the provisions of the prohibition laws of this state, the court or judge, upon a conviction, may order the destruction of such prohibited liquors or beverages as had been sold, offered for sale, or had or kept in possession for sale, or otherwise disposed of by the defendant, or had been employed by him for use or disposition at any unlawful drinking place, or had been kept or used in conducting the business of a liquor dealer or malt liquor dealer when such liquors or beverages have been seized for use as evidence in the case, and such court or judge shall have the like power, upon conviction in case of the seizure for use as evidence, such prohibited liquors and beverages in prosecutions against any person for unlawfully storing, accepting on consignment or delivering, or transporting, or shipping such prohibited liquors and beverages."

"Section 4771. Liquors and beverages declared contraband as to which no property right exists; seizure and destruction of.—No property rights of any kind shall exist in prohibited liquors and beverages, vessels, fixtures, furniture, implements, or vehicles kept or used for the purpose of violating any law for the promotion of temperance or the suppression of the evils of intemperance, nor in any such liquors when received, possessed, or stored in any forbidden place, or anywhere forbidden by law; and in all such cases the liquors are forfeited to the State of Alabama, and may be searched for and seized, and ordered to be destroyed under the rules now prescribed by law concerning contraband liquors, or by order of the judge or court, after a conviction, when such liquors have been seized for use as evidence."

"Section 4773. Prohibited liquors and beverages destroyed and forfeited as contraband.—Whenever prohibited liquors and beverages, or any of them, are seized and held for use as evidence before any court

on the trial of any person for a violation of the prohibitory laws of the state, or the prohibitory ordinance of any city, and the person is convicted for violating such law or ordinance in any way, by his connection with or possession or ownership of the liquors, then, within ten days after conviction, without any order of the court to that effect, the custodian of the liquor is authorized to proceed and shall proceed to destroy the same as contraband and forfeited to the state."

However, should the said party be acquitted on appeal then in my opinion it would be proper for you to return the beverages to said party since the judgment acquitting him would be a decision of a competent court that such beverages were not illegally possessed.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 20, 1937.

Hon. J. Russell Gibson,
Tax Assessor, Pike County,
Troy, Alabama.

Taxation—Homestead Exemptions—

1. Married woman who owns homestead may claim exemption from taxes.
2. Joint owners who actually occupy homestead may claim fractional exemption from taxes.
3. Ownership and occupancy of homestead as of October 1, 1936, necessary to warrant exemption from taxes due October 1, 1937.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"1. I would like an opinion from you on the following:—If two sisters own a home and one is married and her husband lives in the home with them and the husband owns one fourth undivided interest in a home in another part of the city is the sister that is married entitled to her homestead exemption?

"2. If four people own a home and two of them occupy the home are all entitled to the homestead exemption or just the two that live in it?

"3. A man owns two houses and lots and his wife owns a house and the man lives in his wife's house is either one entitled to the exemption?

"4. To obtain an exemption on a homestead is it necessary that the person owned and occupied his home on the 1st day of October, 1936."

Your first question has been answered in a former opinion of this office addressed to the Tax Assessor of Dale County, Alabama, under date of August 10, 1937. I am enclosing herewith a copy of the opinion. By reference to that part of the opinion lettered (h) you will see that your inquiry is answered in the affirmative.

Your inquiry No. 2 has also been answered by that part of the said opinion lettered (e), which holds that joint tenants actually occupying property as "homestead" may claim a fractional part of the homestead exemption in the land. Of course, those joint owners who do not reside on the property nor use the same as any part of their homesteads, cannot claim any fractional part of a homestead exemption in the said land.

Your question No. 3 has also been answered by that part of the said opinion lettered (j). Under the facts submitted by you in your third inquiry, the wife might claim her homestead exemption in the house which she owns, in which she and her husband reside, but the husband could not claim a homestead in the other two houses owned by him.

The question No. 4 has also been answered in the affirmative in the part lettered (g) of said opinion.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

Hon. John M. Graham,
Tax Assessor,
Jackson County,
Scottsboro, Alabama.

Taxation—Homestead exemption—

1. Exemption effective although exemptioner lets part of homestead.
2. Exemptioner may make claim of tax exemption by agent.
3. Abandonment of homestead is question of fact in each individual case.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"1. A taxpayer assesses 75 acres, his home, and a small renter's house. He rents out 16 acres and the small house.

"I have deducted the valuation of the 16 acres and the small house used by renter and given taxpayer exemption on valuation of his own dwelling and the remainder of land which is 59 acres.

"Taxpayer claims he should be allowed exemption on every acre and the house in which his renter resides.

"2. We have a widow taxpayer who owns 97 acres of land. There are two houses on the farm, one being occupied by her and the other by her son, who has a separate family. The mother is 79 years of age and of course unable to tend the land herself. The son rents this land on a share crop basis. Would this lady be entitled to full exemption or merely exemption on the house in which she lives and the few acres which

is used by her as garden, etc? The assessed value of said farm is \$1200. Would the son be permitted to sign homestead exemption papers. He has attended to all her tax matters for several years.

"3. We have several cases of temporary absence from farms. Many of which the farms are rented out and the length of absence indefinite. Would such persons be permitted to claim homestead exemption on farms under temporary absence when stating that they fully intend to return to said home at a time not fully decided upon? Just how long a period is covered by temporary absence?"

Under the facts submitted in your first inquiry, you have erroneously denied to the taxpayer the right to claim homestead exemption on the entire tract of land, provided, of course, that the assessed value thereof does not exceed \$2,000.00.

If the taxpayer occupies the property as his homestead, the fact that he rents a small portion thereof and a house situated thereon to another will not deprive him of his right to tax exemption under the Homestead Tax Exemption Act.

Your second inquiry, for the same reason, should be answered in the affirmative, that is to say, the taxpayer should be allowed exemption from taxation on her homestead to the extent of the 97 acres.

In my opinion the son, or any other duly authorized agent of the taxpayer, may make the claim of homestead exemption for the taxpayer.

The facts submitted in your third inquiry are not specific enough on which to predicate an opinion.

With reference to temporary absences from home, the Supreme Court in the case of **Fuller v. American Supply Co.**, 185 Ala. 512, 516, 517, in speaking to the question in connection with the filing of a declaration of homestead provided for in Section 7914 of the Code of 1923 said:

"Before the statute in question it was never supposed that a homestead exemption could be lost by temporary withdrawals, as, for example, where the owner leaves for the purpose of educating his children, to recuperate his health, to travel in foreign parts, to attend a camp meeting, to engage temporarily in trade, to seek work, to raise a crop, or to hold official position, intending all the while to return. Occasions for some such absences come to nearly every one, and they were not regarded as constituting an abandonment. In such cases the owner was regarded in law as in the actual occupancy of his homestead. Any other interpretation of such absences would make of the homestead, not a refuge, but a prison. An owner, absent on such occasion, has all along been commonly regarded as an actual occupant, and he must be still so regarded, unless the statute has clearly provided to the contrary. A homestead, once acquired, is presumed to continue until a change, *facto et animo*, is shown."

Of course, if the taxpayer leaves his homestead temporarily and files a declaration provided for by the above cited section, a *prima facie* case of intention to return to the said homestead is made, and in the absence of fraud, the taxpayer would be entitled to the benefit of the *prima facie* presumption so raised.

However, each case must be dealt with according to the particular facts involved therein and no general statement can be made which will fit any and every situation which may arise. There is no fixed period during which the

owner of the homestead may absent himself therefrom without the same constituting an abandonment of his homestead. The surrounding circumstances and the bona fide intention of the taxpayer must be considered in each individual case.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

Hon. Woolsey Finnell,
Tax Collector,
Tuscaloosa County,
Tuscaloosa, Alabama.

Officers—Office vacated by death, and right to salary ceases on date of death.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have a letter of July 30, 1937, signed by George R. Oliver, Clerk, which is as follows:

"I shall thank you to furnish immediately, an opinion on the following:

"S. E. Deal went into office as Tax Collector for Tuscaloosa County October 1, 1935. He died July 15, 1937, while in office.

"Is his estate entitled to the remainder of the salary allowed for the year, as provided by Local Act No. 130, 1935 Acts, page 64?

"If the answer to the above question is in the affirmative, when would the year end?

"If the answer to the first question is in the negative, would his estate be allowed the salary for the full month of July, as there seems to be no provision in the above Act for a salary for a part of a month?

"Your attention is urgently desired as there has been appointed a new Tax Collector, and this is needed to assist in the settlement of the affairs of office."

Section 1 of the local act referred to, (Local Acts 1935, page 64) provides.

"That the salary or compensation of the Tax Collector of Tuscaloosa County, Alabama, shall be Forty Two Hundred & 00/100 (\$4,200.00) Dollars, per year, and the said Forty Two Hundred & 00/100 (\$4,200.00) Dollars, annual salary or compensation shall be paid out of the County Treasury of Tuscaloosa County, in equal monthly installments, at the end of each month, upon warrants drawn in the same manner as employees of Tuscaloosa County are paid."

Under Section 7 of the Act, the Act was to become effective on the first day of the month next succeeding the adoption of an amendment to the

Constitution ratifying the Act. This amendment to the Constitution was duly adopted on December 17, 1935.

Under the terms of the Act, the salary, while payable on a monthly basis, was an annual salary. Had this salary been payable under a contract, there would be a close question as to whether the officer was entitled to the full annual salary where he had performed the services for a large part of the year. However, the right of a person holding a public office to compensation does not rest upon contract, and the principles of law governing contractual relations and obligations in ordinary cases are not applicable. (46 C. J. 1014. Ann. Cas. 1918 B. 435 note.)

It is well settled that statutes relating to compensation of public officers must be strictly construed in favor of the government, and such officers are entitled only to what is clearly given by law. *Ex parte Mobile County*, 200 Ala. 410, 76 So. 2; *Smith v. Bowers*, 187 Ala. 406, 65 So. 819; *Long v. O'Rear*, 186 Ala. 558, 65 So. 59; *Macon County v. Abercrombie*, 184 Ala. 283 63 So. 985.

Under the provisions of Code Sec. 2697, the office of Tax Collector of Tuscaloosa County was vacated on July 15, 1937, by the death of S. E. Deal, the incumbent. From that date, neither he nor his personal representative had any right to the office of Tax Collector. Since the salary of an officer is an incident to the title to the office, I am forced to the conclusion that the right to compensation ceased on the date of his death. Compare cases Ann Cas 1918 B. 441, 449. Note, holding right of compensation ceases, on abandonment or removal from office.

I call your attention to Section 97 of the Constitution of 1901, which reads as follows:

"The legislature shall not authorize payment to any person of the salary of a deceased officer beyond the date of his death."

It is true that the local act in question was ratified by a constitutional amendment, and I express no opinion as to whether such constitutional amendment avoids the effect of this Section 97. Section 97 clearly shows a policy of the state not to pay the salary of a deceased official beyond the date of his death, and the local act, even though ratified by a constitutional amendment, should be construed in harmony with that policy.

It is therefore my opinion, and I so advise you, that the estate of S. E. Deal is entitled to no portion of the salary of the Tax Collector of Tuscaloosa County after July 15, 1937, the date of his death. Although the act providing for such salary makes no provision for salary for part of a month, but provides only for an annual salary payable in monthly installments, by virtue of the law declaring the office vacant on the death of such officer, his estate is entitled to compensation at the rate of \$4,200.00 per year, only until the office was vacated by his death on July 15, 1937.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

Hon. I. I. Moses,
Chairman, County Commission,
Russell County,
Phenix City, Alabama.

Taxation—blind person exempt from ad valorem taxes up to \$2,-
000.00.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

I have your letter of June 12, 1937, in which you state:

"Under sub-division (6) of Section 3022 of the Code of Alabama of 1923 blind persons are exempt from ad valorem taxes to the extent of \$1,000.00. The County Commission would like to be advised as to whether or not this exemption covers ad valorem taxes due the County as well as ad valorem taxes due the State."

Subdivision 6 of Section 3022, Code of Alabama, 1923, has been amended by Section 2(f) of Act No. 194, General Acts of Alabama, 1935, page 256 which is as follows:

"The following property and persons shall be exempt from ad valorem taxation and none other: * * * (f) The property of deaf mutes and insane and blind persons to the extent of two thousand (\$2,000.00) dollars."

In my opinion, the statute exempts the property of a blind person from all ad valorem taxes up to \$2,000.00 of actual value.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Costs—

Section 3 of Act 227 H. B. 88, approved March 1, 1937, (General Acts, 1936-37, page 270) relative to fees and guardianship settlements of disabled veterans under the Uniform Veterans Act controls over fees provided for in Section 7285, Code of Alabama, 1923, for probate judges generally.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of recent date which is as follows:

"Under an amendment passed during the last session of the legislature, amending the 1931 Uniform Veteran's Act:

"The costs and fees exclusive of fees of the guardian-ad-litem incident to any partial or final settlement by any guardian subject to the provisions of this Act shall be taxed in the amounts provided by the general statutes for like services, but of such costs and fees there shall not be taxed or charged against the estate of the ward, on any partial settlement, any amount in excess of one-half ($\frac{1}{2}$) of one per centum (per cent) of the amount of money with which the guardian is chargeable on the settlement as having received since the last preceding settlement and with which the guardian has not previously been charged.'

"In a great number of cases the court costs will not exceed \$2.00 on partial settlement, under this new Act. Will you kindly advise, if, in your opinion, when an estate is large enough to exceed the regularly fees under Probate Court fee bill (Section 7285), should we collect the one-half of one percentum, or should we collect under Section 7285 of the 1923 Code of Alabama."

In answer to your inquiry, I am of the opinion the proper fees chargeable and collectible in the cases under consideration are determined by Section 3 of Act No. 227, H. B. 88, approved March 1, 1937, (General Acts, 1936-37, page 270). Said section deals with the fees in certain classes of cases and governs all of the general provisions of Section 7285, Code of Alabama, 1923, which deals with fees of probate judges in general. Special provisions relative to specific subjects and general provisions relative to general subjects and things specially treated will be considered as exceptions to the general provisions.—**Herring v. Griffin**, 211 Ala. 225, 100 So. 202. Moreover, the 1937 Act is the one of later passage and will govern over the 1923 Code Section.

Yours very truly,

A. A. CARMICHAEL,
Attorney General,

September 20, 1937.

Hon. L. R. Stone,
Superintendent,
Board of Education,
Bibb County,
Centreville, Alabama.

Sales Tax—

Gross receipts derived from sale of automobiles, automobile equipment and accessories, to individuals for operation as school bus are subject to sales tax.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"Sometime ago you rendered an opinion in which you stated that school buses and trucks purchased by school boards would be tax exempt. The question arises in my mind as to whether or not school

bus bodies and trucks purchased by private owners who operate such equipment under the direction and control of boards of education would be allowed this tax exemption when they purchased trucks and bodies to be used in the transportation of school children only?

"Please let me have your reply at the earliest possible moment. We have drivers who are waiting on this opinion whose trucks must be purchased and ready for the job by Sept. 4."

It is my opinion that gross receipts derived by a dealer from the sale of automobiles, automobile equipment and accessories, to an individual for operation as a school bus are subject to sales tax, imposed by the Alabama Sales Tax Act. I know of no law which extends an exemption to individual purchasers of the class above mentioned from the payment of this tax.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

September 20, 1937.

Hon. A. H. Collins, Commissioner.
Department of Public Welfare,
Capitol.

Public Welfare—State Board may as a matter of policy make ineligible for employment by State and county Boards within county, relatives of county officers of such county.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Section 4 of the Act creating the State Department of Public Welfare (Act No. 332—S. 365-Walton, 1935 Regular Session of the Legislature p. 762) reads in part as follows:

" 'The State Board shall have the power and it shall be its duty to fix minimum standards of service and personnel, and to set salary schedules, based upon education, training, previous experience, and general efficiency which must have been attained by persons selected for the positions to be filled in the State Department and the County Departments of Public Welfare hereinafter created. Provided, however, the State Board shall not disqualify those Child Welfare Workers from holding office, if they have had at least four years experience as a Child Welfare Worker in Alabama for the past four years prior to the passage of this Act, on account of educational requirement, training, previous experience and general efficiency.'"

"Section 12 of this Act reads in part as follows:

" 'It shall be the duty of the County Board of Public Welfare to appoint a County Director of Public Welfare who shall be the executive officer of the County Department meeting the qualifications prescribed by the State Board . . . '

Section 14 of the Act reads in part as follows:

" 'The County Director, with the approval of the County Board, shall appoint such staff as may be necessary to administer all welfare activities within its jurisdiction and to perform all other duties required of him. Such appointments with the exception of the clerical staff, shall meet the qualifications as to training, experience and efficiency which are prescribed by the State Board.'

"In prescribing qualifications for directors of county departments of public welfare, the State Board of Public Welfare set up the following regulation relating to kinship of directors to county officials:

" 'No relative within the fourth degree, affinity or consanguinity, of any member of the County Board of Welfare of County Commissioners Court, or like governing body, or of any other county officer, shall be eligible to employment by the State or County Board of Welfare within the county in which the relationship exists.'

"Will you advise me if the above-mentioned regulation with respect to qualification of county directors can be prescribed under the provisions of the sections of the Act cited."

Your inquiry as to the power of the State Board must be answered in the affirmative, but such authority is not granted by that part of Section 4 cited in your inquiry.

You cite only a part of Section 4 of the Public Welfare Act in your inquiry. The cited portion of Section 4 has to do with the educational or professional qualifications of employees and officials of the Department of Public Welfare, both in the State Departments and in the several County Departments.

However, Section 4 also provides:

"The State Board in conference with the Commissioner shall be responsible for the adoption of policies, rules and regulations for its government and for the government of the State Department * * ."

Under this authority, the State Board may, as a matter of policy, render ineligible for employment within a county, by the State or a County Board of Welfare, any person related to any county officer. Relationship does not come within the provisions of Section 4 cited in your letter of inquiry; but it may be against the policy laid down by the Board of Public Welfare. And the adoption of such a policy is within the powers and authority of the Board.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

September 20, 1937.

Hon. R. J. Goode,
Commissioner of Agriculture,
C A P I T O L .

State Board of Agriculture and Industries may establish reasonable rules and regulations for the enforcement of Act No. 190, H. B. 106, approved April 21, 1936, (General Acts, 1936, page 222) in accordance with Section 6 thereof.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date which follows:

"I beg to refer you to an Act of the Legislature approved April 21, 1936, commonly referred to as the Act to regulate the business of buying livestock for resale or slaughter etc. The bill is House Bill No. 106 by Mr. Hare.

"You will note that under Section 6 power is conferred upon the Commissioner of Agriculture and Industries with the approval of the State Board of Agriculture to establish rules and regulations not inconsistent with law for the conduct, manufacture and operation of any business as defined in the law.

"I beg to refer you to regulation No. 10, which provides as follows:

" 'Persons who shall be found transporting their own animals in their own vehicles or driving the same along the public roads shall furnish the proper officials the information required in paragraph 9 above, which shall be forwarded to the Commissioner of Agriculture.

" 'Such owners so transporting or driving their own animals to market shall deliver to the person to whom sold a bill of sale in the form provided above."

"The question I desire to propound is this: Does the Act above referred to confer upon the Board, as provided in Section 6, the power to promulgate rule and regulation No. 10, quoted hereinabove? Is regulation No. 10 just quoted in conflict with any provision of the Act, and is rule No. 10 in conformity with Section 6 of the Act in question? Stated a little differently, would the Board exceed its authority in any way in promulgating rule and regulation No. 10?"

In answer to your inquiry I am of the opinion that under the provisions of Section 6 of Act No. 190, H. B. 106, approved April 21, 1936, (General Acts, 1936, page 222) the Commissioner, with the approval of the State Board of Agriculture and Industries, has the authority to establish and promulgate the rule and regulation above set forth. Section 6 of the Act in question provides as follows:

"Section 6. Power is hereby conferred upon the Commissioner of Agriculture and Industries, with the approval of the State Board of Agriculture, to establish rules and regulations not inconsistent with law, for the conduct, management and operation of any business as herein defined, including the making, keeping and inspection of records to facilitate the tracing and identifications of such livestock, the records to be

kept, reports made and other like matters provided for to protect against stealing or unlawful dealing in or transportation of such livestock."

The regulation in question seems to me a reasonable rule and regulation in that it will tend to enforce the provisions of the Act in question. Said regulations, in my judgment, is reasonable and does not conflict with any of the provisions of the Act in question.

The Legislature has authority to delegate police power to subordinate boards and commissions and a reasonable rule and regulation will be upheld as a delegated power and will not be invalid. *Scrimetta v. Alabama Oyster Commission*, 232 Ala. 371; 168 So. 168. Quarterly Report of Attorney General, Vol. IV, page 102.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

September 20, 1937.

Hon. R. E. Steiner,
Vice Chairman,
Alabama State Docks Commission,
Mobile, Alabama.

Alabama State Docks—has implied authority to contribute towards the expense of movement of Southern Governors' Conference seeking to revise railroad rates.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 17, 1937, which is as follows:

"The State Docks Commission is naturally very much interested in the success of the effort being made by the Southern Governors' Conference before the Interstate Commerce Commission, seeking to revise the railroad rates. Success would be of great value to the State Docks.

"The State Docks would like to contribute \$1000.00 toward the expense of this effort and would be glad to do so, if you can advise that it can do it."

I am of the opinion that your inquiry should be answered in the affirmative.

In an opinion rendered to you on June 9, 1936, (Quarterly Report of Attorney General, Vol. III, p. 151), it was held that the State Docks Commission has implied authority to advertise and pay for advertising in newspapers, magazines or periodicals in Alabama. Said opinion, after setting forth the authority of the State Docks Commission, stated as follows:

"As shown above, the State Docks Commission has the authority, among other things, to promote and develop all harbors and seaports within the State or its jurisdiction. 'Promote' is defined in 50 Corpus Juris, 717, as follows: 'To contribute to the growth, enlargement, or prosperity of; to forward; to encourage; advance; to further; * * *;' while 'develop' is defined in 18 Corpus Juris, 1031 in this manner: '* * * to

bring to light by degree; to disclose; * * * to uncover or unfold;
* * *.

"Advertising, judicially placed, in newspapers, magazines or periodicals in Alabama, explaining the advantages to be derived from the use of the facilities of the State Docks, would tend to 'contribute to the growth, enlargement or prosperity of and to forward, encourage, advance and further' the work which the State Docks Commission is authorized to carry on; as well as 'to bring to light by degree, to disclose, and to uncover and unfold' this work. Therefore, it is my opinion that the express authority given the State Docks Commission to promote and develop all harbors and seaports within the State and its jurisdiction gives its authority by necessary implication to advertise and pay for advertising in newspapers, magazines or periodicals in Alabama."

The above quoted portion of that opinion is applicable to the present inquiry. The reduction of railroad rates would tend to "contribute to the growth, enlargement or prosperity of and to forward, encourage, advance and further" the work which the State Docks is authorized to carry on. Therefore, it is my opinion that the expressed authority given the State Docks Commission to promote and develop all harbors and seaports within the State and its jurisdiction gives it authority by necessary implication to contribute to the effort of the Southern Governors' Conference to revise railroad rates.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

September 20, 1937.

Hon. E. J. Huet, Clerk,
Inferior Criminal Court of Mobile,
Mobile, Alabama.

Alabama Beverage Control Act:—

1. The Solicitor's fee in prosecutions for violation of the Alabama Beverage Control Act is the same as the fee in prosecutions for violation of the old prohibition law, viz: \$30.00, and a warrant or affidavit charging defendant with sale, possession or disposing of spirituous liquors contrary to law, can apply either to violation of the Alabama Beverage Control Act, or the old prohibition law.

2. There is no provision in the Alabama Beverage Control Act which requires any part of a fine assessed in criminal prosecutions under the Act to be remitted to the State instead of the County.

Opinion by Assistant Attorney General Hill.

Dear Sir:

I have your letter of August 10th, 1937, in which you request my opinion as follows:

"Will you please give me your opinion and answer to the following questions:—

"1. Under the old prohibition law, the solicitor's fee in cases involving violation of the prohibition law is \$30.00. In all other misdemeanors not especially provided for, the solicitor's fee is \$10.00. Under the Alabama Beverage Control Act should I collect, in prosecutions, a fee of \$30.00 or a fee of \$10.00? Some of our warrants and affidavits charge defendants with sale, possession or disposing of spirituous liquors, contrary to law; when such is the case, is the prosecution under the old or new law?

"2. Is there anything in the act which would require all or any part of the fine to be remitted to the State instead of to the County; the fine going to the County in all other cases."

In reply to your first question, I wish to advise you that it is my opinion that the Alabama Beverage Control Act has not changed the amount to be allowed and collected as Solicitor's fee in the prosecution of persons violating either this Act or the old prohibition law. To the contrary, the Act clearly says that nothing therein contained shall be construed as repealing any law fixing fees due officials for the enforcement of any and all laws, including the Alabama Beverage Control Act, but that said laws fixing fees for such officials shall remain in full force and effect. I wish to call your attention to Section 61 of the Alabama Beverage Control Act, and, particularly, to that part underscored. Section 61 is as follows:

"Section 61. All laws and parts of laws in conflict herewith, either special or general except as herein otherwise specially provided are hereby repealed, provided that nothing herein shall relieve any person, firm or corporation from any penalty or tax liability or forfeiture incurred under former laws, and nothing herein contained shall be construed as repealing any of the laws of Alabama relating to the manufacture or possession of illicit distilled liquor or apparatus for the manufacture of same, nor any law now fixing fees to officials for the enforcement of any and all laws, including this Act, but the same shall remain in full force and effect. Provided, however, that neither this Section nor any of the provisions of this Act shall affect in any way offense already committed, or any indictment already found for the violation of the prohibition laws of this State or any pending criminal action based upon such laws."

Where your warrant or affidavit charges defendant with sale, possession or disposing of spirituous liquors contrary to law, it is my opinion that it may apply to prosecutions under either the Alabama Beverage Control Act, or the old prohibition law. The Alabama Beverage Control Act did not repeal the old prohibition law or any part of it that is not in conflict with the Act. You will note in the above quoted Section 61 of the Alabama Beverage Control Act that it only repeals those laws and parts of laws in conflict with the Act.

In my opinion, your question numbered two should be answered in the negative. There is no provision in the Alabama Beverage Control Act which requires all or any part of a fine collected in a criminal prosecution for violation of the Act to be remitted to the State instead of to the County.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

September 22, 1937

Hon. J. F. Hearn,
Member of Jury,
Choctaw County,
Butler, Alabama.

1. Budget Act—Salary of Member of Jury Board held subject to said Act.

2. County Commissioners should set up budget making provision for payment of compensation of members of jury board where funds are available.

3. Jury Board not compelled to elect clerk.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 12, 1937, in which you request my opinion as follows:

"Sometime ago during the first part of this year, I was appointed a member of the Jury Board of Choctaw County. I find that there was \$2,000.00 appropriated by the Commissioners' Court under the Budget Act for the Jury Board for the fiscal year beginning October 1, 1936, and ending September 30, 1937, and that in February of this year, \$153.00 of this amount was paid out, and I am informed by the County Treasurer that he doubts that the other \$47.00 will be available since the County will be unable to meet the appropriation set forth in the budget.

"I note that under the law, each member of the Jury Board shall be paid the sum of \$5.00 per day for the time actually engaged in the discharge of his duties as such member, and that in a county of the population of Choctaw County, the amount paid shall not exceed, for any one year, the sum of \$100.00. I further note that the Act authorizes the Jury Board to elect a clerk. Heretofore in this county, for the past several years, it seems that the Clerk has drawn the salary and the members of the Jury Board have been receiving County Warrants, that are not cashed, and are of very little, if any, value. I would like to have your opinion as follows: First—Would the pay under Section 5 of the Jury Board Act of 1931, page 55, come under the Budget Act? In other words, the jury law provides that the Board shall receive \$5.00 per day for the time actually engaged. Have the Commissioners the right to set up a budget that is insufficient to pay the Jury Board, or is it the duty of the Commissioners' Court to make provisions for payment of the Compensation of the members of the Jury Board? Second—Is the Jury Board compelled to elect a clerk, or has the Board the right to attend to the business and discharge the duties thereof without a clerk? thereby saving the expense of a clerk."

Answering your inquiry I wish to first call your attention to an opinion to Hon. G. H. Howard, Probate Judge, Elmore County, under date of October 7, 1936, (Quarterly Report of the Attorney General, Vol. V., page 38) wherein it was held that from the provisions of the Act it was clear that the intent of the Legislature was that the Act was to apply only to the General Fund as far as its budget provisions were concerned. This opinion is also cited in an opinion rendered to Hon. N. P. Tompkins, Judge of Probate, Colbert County, under date of October 7, 1936, found on page 32 of Vol. V of the Quarterly Report of the Attorney General. Inasmuch as the Jury law

provides that the said Board shall receive \$5.00 per day from the said General Fund for their services rendered, under the foregoing opinion it is obvious that this compensation must come under the provisions of the budget act hereinabove referred to.

This brings us to the question of whether or not the Commissioners have the right to set up a budget which makes insufficient allowances to pay the Jury Board or whether it is the duty of the Commissioners' Court to make provisions for payment of the compensation of members of the said Board. In this connection I direct your attention to Section 231 of the Code of Alabama of 1923 as amended by General Acts of 1935, pages 162 and 990. You will note that in sub-section 4 of Section 231 the following claims are declared to be preferred claims against the county, and that they should be given priority in order named:

"Compensation of the Members of the Court of County Commissioners or Boards of Revenue; the compensation of the Probate Judge, the Sheriff, the Tax Assessor, Clerk of the Circuit Court, **Jury Commissioners** and Deputy Solicitors for services performed by them, and authorized to be paid to them by law; and claims of the the Secretary of State for certified copies of field notes."

Section 231, supra, concludes as follows:

"For the payment of the above recited claims, in the order named, it shall be the duty of the county treasurer or custodian of the county funds to set apart a sufficient fund from the moneys of the county and he and his official bond shall be held liable for a failure so to do, insofar as the funds of the county make it possible for him so to do."

In view of the provisions of Section 231, it is obvious that if the Commissioners have knowledge of the fact that the funds accruing to the general fund will be sufficient to pay for all the preferred claims enumerated in Section 231, there can be no reason for the Commissioners' Court to fail to make provisions for payment of the compensation of the members of the Jury Board, and it is their duty to so provide.

In answer to your question of whether or not the Jury Board is compelled to elect a clerk or whether the Board has the right to attend to the office and discharge the duties thereof without a clerk. I direct your attention to the opinion found in Vol. I of the Quarterly Report of the Attorney General, page 59, in which opinion your request is answered in full.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

September 22, 1937.

Hon. R. R. Coleman,
Tax Assessor,
Clarke County,
Grove Hill, Alabama

Taxpayer who assessed property in name of unincorporated company which he operates is not thereby barred from claiming homestead in such property.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of August 25, 1937, as follows:

"A taxpayer in this county owns a building which he occupies as his residence, and in the same building operates a drug store under the trade name of Peerless Drug Company. The property is assessed in the name of the Peerless Drug Company, which is not a corporation, but is merely the trade name under which this taxpayer does business. He desires to claim the property exempt as a homestead. Assuming that the use of the property for business purposes is merely incidental, and that its primary use is as a dwelling house or a place of residence for this taxpayer and his family, is he precluded from an allowance of exemption by reason of the fact that the assessment stands on my record in the name of Peerless Drug Company?

"Also, in circumstances like this, have I any duty or authority to determine whether the property used is primarily business property or residence property, where the same building is used for both purposes? Or am I authorized to accept the statement of the taxpayer that the primary use of the building is for a dwelling house and that the business is incidental?"

This department has previously held that property which is used primarily as a homestead and secondarily for commercial purposes, is exempt from state tax, but if the property is used primarily for commercial purposes it is not exempt.—Opinion addressed to Hon. J. E. McAdory, Deputy Tax Assessor, Jefferson County, Bessemer, Alabama, dated August 12, 1937, with authorities cited therein. In the instant case the fact that the property was assessed in the name of Peerless Drug Company might indicate that the property was used primarily for business purposes. However, the test is whether the commercial use prevails or whether the homestead use prevails. I am of the opinion that this is the test, and the fact that the property owner assessed the property in the name of the business which he operates, when he is the actual owner of the property and the business is not incorporated, would not prevent him from claiming homestead.

Your second question is answered in paragraph 1 of an opinion addressed to Hon. T. D. Woodham, Tax Assessor, Dale County, Ozark, Alabama, dated August 10, 1937, copy of which appears on page 22 of the compiled opinions sent you.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

September 22, 1937.

Hon. W. B. Thrash,
Tax Assessor,
Cleburne County,
Heflin, Alabama

Separate tract, not contiguous to and not used in connection with tract on which taxpayer resides, is not part of homestead and not exempt.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of August 24, 1937, in which you request my opinion as follows:

"Please advise me where a man owns two tracts of land say ten acres where he lives and eighty acres one mile away and he works in town on a salary and he hires the eighty acre tract cultivated, is he entitled to exemption on his eighty acres with his ten acres he lives on or only the ten acres?"

I do not understand from the statement in your letter "he hires the eighty acre tract cultivated" whether the taxpayer hires some one to cultivate the tract, or whether it is rented to some tenant. You have recently been furnished with a copy of the opinions of this office on the subject of homestead exemptions. In an opinion to Hon. John Ben Darden, Tax Assessor for Chambers County, dated August 12, 1937, this office ruled that the renting of a portion of a homestead does not deprive the rented portion of its character as a homestead.

The courts of this state have liberally construed the homestead exemption laws. Under certain circumstances, it has been held that two tracts though contiguous, may together constitute the homestead **Dicus v. Hall**, Hooper & Co. 83 Ala. 159, 3 So. 239, **Shubert v. Winston**, 95 Ala. 514, 11 So. 200. Following these cases, in an opinion to Hon. T. D. Woodham, dated August 10, 1937, headnote (b), this office ruled that the owner of a farm who lived approximately five miles therefrom on a five acre tract is entitled to homestead exemption out of the farm **provided he cultivates both tracts in connection with each other and in common for the support of his family**. This cultivation in connection with each other and in common for the support of the family "is tantamount to actual occupation thereof as required by law."

If, therefore, you determined that the two tracts were cultivated in connection with each other and for the common support of the family, both tracts might be claimed as a homestead. However, the facts set out in your letter contradict such finding. It does not appear that the eighty acre tract is cultivated by the owner in connection with the ten acre tract. It does not appear that the ten acre tract is cultivated at all. To the contrary, it appears the owner works in town on a salary. In my opinion, this negatives any idea that he cultivates the eighty acre tract in connection with the ten acre tract on which he lives and in common for the support of his family. Therefore, it is my opinion that, under the facts set out in your letter, the taxpayer is not entitled to exemption on the eighty acre tract.

Yours very truly,

A. A. CARMICHAEL,
Attorney General,

September 22, 1937.

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Taxation—Homestead Exemption—Act No. 107, Special Session,
1936-37,—Redemption from Tax Sales.

Property, used as homestead, may be claimed as exempt from taxes due after redemption but cannot be claimed as exempt prior to redemption.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of August 24, 1937, in which you request my opinion as follows:

"The press has quoted from your department opinions about the new machinery to be put into commission to make effective the new homestead exemption act, particularly G. A. Ala., 1936-37 page 113.

"However, I have not seen anything yet about whether or not the new Act, G. A. Ala., 1936-37 page 113, or any similar act effecting the redemption or purchase from the state of land heretofore sold for taxes. (Please refer to my letter of February 23, 1937, and your letter of June 26, 1937.)

"Please give me your opinion as to whether or not land sold any time before October 1, 1937, and subsequently redeemed according to statute, that the applicant be entitled to redemption with credit allowance for the homestead exemption.

"The importance of the problem is that there are hundreds of people over the State of Alabama qualified to redeem their land under the installment payment plan, or otherwise. In many cases the paying of their current taxes by installment and availing themselves of the exemption would be beneficial to owners of property; and at the same time strengthen the State and County tax rolls. If it be true that the people who are considering redeeming sometime will be entitled to any exemptions if they redeem and there are any dates or restrictions on the credit, please advise me so that the people of this county who are so unfortunate to have their land under sale to the state may redeem them as soon as possible and at as little cost, but bring much revenue to the State of Alabama and to Madison County."

As to property heretofore sold to the state and heretofore redeemed, this office has ruled that the taxpayer is entitled to claim homestead exemptions. Opinion of August 10, 1937, to Hon. J. E. McAdory, copy of which I enclose. In that opinion this office considered only the right to claim such exemptions after redemption. Your request is for information as to the right to claim credit on the amount required for redemption.

In an opinion of this office in Quarterly Reports 1, page 329, it was held that the fact that property which had been sold to the state for taxes would have been exempt while owned by the taxpayer did not affect the amount required to be paid upon redemption.

Such amount to be paid upon redemption is specifically provided by Sections 270 and 269 of the Revenue Act of 1935, as amended by the Acts of the Extra Session of 1936, page 30. As to lands purchased by the state, it is required that the redemptioner deposit the amount of money for which the lands were sold, "together with the amount of all taxes found to be due on such land since the date of sale."

Section 269, as amended, further provides that the probate judge shall submit the application for redemption to the tax assessor whose duty it is to enter an assessment value.

Section 270 regulates the redemption from a purchaser other than the state and requires payment of the purchase price with interest, together with taxes paid by the purchaser. It is also provided (Revenue Act 1935, Sec. 270) that if any taxes have been assessed to the purchaser and have not been paid, the probate judge shall require the party desiring to redeem said land to pay the tax collector the taxes due.

The opinion in Quarterly Report 1, page 329, was a correct conclusion from these statutes as they then stood. The question now becomes whether or not the homestead exemption law in any way changes the effect of these statutes and the previous conclusion reached therefrom.

There is some support for the contention that the effect of the homestead exemption act (Acts of Special Session, 1936-37, p. 113) is so broad that in computing the amount of taxes due since the date of the sale, as provided by Section 269, *supra*, there should be excluded any taxes upon the homestead. The circumstances leading up to the passage of the homestead exemption law are matters of common knowledge. However, in view of the conclusion hereafter reached, I do not find it necessary to determine whether, under the homestead exemption act, the amount of State taxes assessed against the homestead is excluded from the amount required to be paid on redemption by Section 269, as amended, "all taxes found to be due on such land."

The homestead exemption act refers for a definition of homestead to the word "homestead" as defined by the Constitution and laws of the State of Alabama. The homestead exemption as defined by the Constitution of Alabama is "Every homestead not exceeding eighty acres and the dwelling and appurtenances thereon, to be selected by the owner thereof, and not in any city, town or village, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with a dwelling and appurtenances thereon, **owned and occupied by any resident of this state** and not exceeding the value of \$2,000.00."

These words "owned and occupied" have been subject to judicial construction many times. It has been held that it is not necessary that the claimant own a legal title thereto. It is sufficient if he has an interest therein which is less than an estate in fee. *Tyler v. Jewitt*, 82 Ala. 93, 2 So. 905. It is also held that the homestead right may attach to lands held in fee or for life or a term of years. *Murphy v. Vaughn*, 226 Ala. 461, 147 So. 407. Or even an interest pursuant to a contract of purchase is sufficient. *Burrow v. Clifton*, 186 Ala. 297, 65 So. 58.

Considerable doubt arises as to whether the former owner of a homestead which has been sold for state taxes has any interest therein which will support a claim for exemption. It is true that in Sections 268, 271, 271(1) and 281, the taxpayer is referred to "as the owner" but this is evidently only for the purpose of identifying the taxpayer as the former owner. The tax-

payer does not have the right to have notice given to him before a sale is made by the state to any other party. Section 281, Revenue Act of 1935.

Sections 285 and 289 of the Revenue Act of 1935 provide that if the property is not redeemed within the time allowed by statute, all right, title and interest of the owner is vested in the state. From this the conclusion might be reached that until the time for redemption expires, the owner has sufficient title, right or interest as would support the claim for homestead exemption. However, you will note from the words emphasized in the constitutional definition of a homestead that the homestead must not only be owned but must be **occupied** by the person claiming the same as a homestead. Immediately upon certificate of the sale being executed, the state under Section 251, or a purchaser other than the state under Section 252, is entitled to immediate possession. Of course, if the person claiming or attempting to claim the homestead is not in actual or constructive occupancy thereof, he would not be entitled to claim the property as a homestead under the constitutional definition.

In my opinion, since the lawful right of possession is vested in the purchaser at the tax sale, either the state or other party, the former owner can no longer claim to have such a title and the occupancy as would support a claim of homestead exemptions. In my opinion, therefore, in all applications to redeem property from a tax sale, there must be collected the amount specified by the Revenue Code without allowing any credit for a claim of homestead tax exemption in the former owner of said homestead.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 22, 1937.

Hon. John J. Flowers,
Tax Assessor,
Montgomery County,
Montgomery, Alabama.

Authorized agent can make homestead claim for exemption.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of August 20, 1937, in which you request my opinion as follows:

"In further reference to Homestead Exemptions, please advise me in regard to the following:

"We have here in Montgomery, and I am sure the same condition prevails in other localities, Real Estate Agents who represent many clients, some of whom live in Montgomery proper but in many cases their clients live away from here. The question has arisen—Can an authorized agent make homestead claim for exemption for his client?

"Section 7914, Code of 1923, provides for a non-resident to file with the Probate Court his claim of exemption due to temporary absence, then after such has been filed with the Probate Court—can his or her agent represent said party for the following years?"

Under the act approved March 12, 1936, (Acts of Alabama, Extra Session, 1936, page 4) there was imposed upon the Tax Assessor the duty of listing and valuing the homestead separately from other property. Under the provisions of Section 32 of the Revenue Laws of Alabama of 1935, the Tax Assessor is required to administer the oath to the person making the return of the property for taxes and also claiming the homestead exemption.

The exemption of homesteads from state taxes as provided by Act No. 107 of the Special Session of 1936-37, provides for no formal claim of homestead other than is required by the Act of March 12, 1936, above referred to. It is therefore my opinion that the claims of homestead exemptions can be made by authorized agent in the same manner as an assessment for taxes may be made by such agent. In my opinion, it is not necessary for a taxpayer to file a claim for homestead exemptions in the Probate Court under Code Section 7890-7914 in order to secure the benefits of the exemption from taxes. This claim is required to be filed with the Probate Court in order to secure an exemption from levy and sale under process. The filing of such statement in the Probate Court would be evidence to be considered by the assessor in determining whether such property is a homestead, but the failure to file same would not be conclusive.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 22, 1937.

Hon. I. I. Moses,
Chairman, County Commission,
Russell County,
Girard, Alabama.

Workman's Compensation Act—Counties may elect to come within provisions of the Workman's Compensation Act in regard to their road employees if proper procedure is followed. Premium on policies is payable out of the General Fund and not out of the Gasoline Fund or the Road and Bridge Fund.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date, which is as follows:

"Russell County is contemplating securing Workman's Compensation Insurance for the protection of its employees engaged in road work for the County and the County Commission of Russell County would like to be advised about the following question:

"1. Can Russell County pay the premium for Workman's Compensation Insurance out of the gasoline tax fund received by the County and which is collected by the State and paid to the County?

"2. Can the premium on Workman's Compensation Insurance on the employees of the road department of Russell County be paid from the proceeds of the special two and one half mill tax levied under Section 215 of the Constitution for road and bridge purposes?

"If the County cannot pay the premiums on Workman's Compensation Insurance from either of the above mentioned funds can it make payment of such funds out of the general funds of the County?"

Before definitely answering your inquiry it is first necessary to determine whether or not counties come within the provisions of the Workman's Compensation Act. This office has recently held that counties may come within the provisions of said Act if proper procedure is followed and all former opinions of this office on this subject were overruled. **Biennial Report of the Attorney General, 1930-32, page 160; Quarterly Report of the Attorney General, Vol. 5, page 107.** In connection with the procedure to be followed so that the county may elect to come within the provisions of the Workman's Compensation Act, I especially refer to the opinion in the Biennial Report of 1930-32, page 160. Assuming that the county has properly elected to come within the terms of the Workman's Compensation Act, the question then presents itself as to what fund or funds the premiums on the insurance should be paid from. In instant case, the insurance is on the employees of the road department.

There is no specific provision for the payment of the premium on Workman's Compensation Insurance. However, since this authority is granted it follows by necessary implication that premiums would have to be paid. There being no specific mode provided for the payment of said premiums, same would have to be paid out of the General Fund of the County. See **Weaver v. Tidwell, 228 Ala. 167, 153 So. 218.**

The further question presents itself as to whether or not the fact that the insurance is on the employees of your road department authorizes the payment of said premium out of the Gasoline Fund or out of the Road and Bridge Fund. I am of the opinion that this inquiry should be answered in the negative. Such, in my opinion, would not be an expenditure for the maintenance, repair, or construction of roads and bridges in the county. The taking out of such insurance is a mere gratuity and in no wise contributes to the maintenance, repair, or construction of its roads and bridges. I make this statement for the reason that the county could not be held liable in tort for any injuries to its employees when engaged in such work. **Quarterly Report of the Attorney General, Vol. 5, page 107.**

The premises considered, it follows that your first and second inquiries should be answered in the negative and that payment of the premium on the Workman's Compensation Insurance, if properly taken out, should be paid out of the General Fund of the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 23, 1937.

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Special Election held March 10, 1937—

Expenses: Postage for absentee ballots is proper charge; printing poll list in newspaper is not proper charge; clerical assistance for

preparing poll list where county employs regular clerk is not proper charge.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

I have your letter of June 11, 1937, in which you state as follows:

"Subsequent to the Special Election held March 10, 1937, an Alabama County has submitted to this office for payment, the following described bills to wit,

"Postage, Stamps; 500 @ .03 \$15.00

For Absentee Ballots for Special Election.

"For printing Poll List in local paper for Election held March 10th, 1937, \$125.00

"We also have a bill submitted wherein the sum of .05c per name is charged for the preparation of the Official Poll List of the County: The County employs a full time man, paying to him a monthly salary and it is his duty or duties to keep the poll list current at all times.

"You have recently held that the Judge of Probate of a County has the right to employ such Clerical Assistance as may be necessary for the purpose of making such list and that the person or persons so employed may be paid the sum of not to exceed .05c per name.

"In the instant case, the Judge of Probate is not the Chairman of the Board of Revenue.

"Will you please advise this office if the foregoing charges are such as to warrant payment from the State under the terms and provisions of the Alabama Beverage Control Act."

I am of the opinion your first inquiry should be answered in the affirmative. As the expense of absentee ballots is a proper charge in a general, special, or municipal election, (Section 412, Code of Alabama, 1923) it is a proper charge against the State in the special election held March 10, 1937.—Section 51, Alabama Beverage Control Act, 1937.

In my opinion your second question should be answered in the negative. Section 387, Code of Alabama, 1923, provides for publication of the list of qualified electors only in the even numbered years.

With regard to your third question, I assume that the "full time man" to whom you refer is employed in a county having a population of not less than 100,000 nor more than 150,000 as provided for in Act No. 251, General Acts 1931, p. 293, which amends Section 402, Code of Alabama, 1923. This act has a general provision to the following effect:

"The Judge of Probate may employ such assistants and clerical help as may be necessary to complete and properly prepare the list of qualified electors which the Judge of Probate is required to furnish the election inspectors."

The act also contains a special provision to the following effect:

"The judge of probate in all counties having a population of not less than one hundred thousand nor more than one hundred fifty thousand, according to the last or any subsequent Federal census, is hereby authorized and directed to employ a Clerk to assist the Board of Regis-

trars of said County. The duties of said clerk shall be to submit to the Board of Registrars, revised election lists of said county by placing all persons in their proper ward or precincts and elimination therefrom all deceased, non-resident and fictitious persons named upon said roll and from connection of crime and shall further attend to all clerical work of the Board of Registrars. He shall be paid a compensation, out of the county treasury, of not more than \$250.00 per month, to be fixed by the Judge of Probate."

If you refer to a county having a population between 100,000 and 150,000. I am of the opinion that no expense, other than the salary of the "full time clerk", is authorized for preparing the official poll lists. One of the cardinal rules of the construction is that a special provision of a statute will control one which is general.—*City of Birmingham, v. Southern Express Company*, 164 Ala. 529, 51 So. 159.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 23, 1937.

Hon. J. D. Sexton,
Clerk, Circuit Court,
Hamilton, Alabama.

Local Acts 1915, Marion County—Local Acts 1915, p. 130 held unconstitutional and void.

Fines and Forfeitures—Fees of criminal cases in Marion County, Alabama, payable out of funds collected from fines and forfeitures in the county treasury.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Please answer for me the following questions:

"1. Did the Local Act for Marion County, Local Acts 1919, page 76, approved Aug. 22, 1919, repeal Local Act of said County, Local Acts 1915, page 130, Approved Aug. 22, 1915, as to all of its provisions? If not, what was repealed by the 1919 act?

"2. Did the general act of 1932 Special Session, amending Section 3762 of the Code of 1923, General Acts 1932, page 102, repeal the act of 1919 above referred to? Or would the general act only reduce the per diem?

"3. What per diem and what mileage should be paid witnesses in criminal cases in Marion County, Alabama?

"4. The County Treasurer wants to know whether any witness claims in criminal cases in Marion County, Alabama, are chargeable against the general fund of said County, under a local law or under a general law?"

In reply, I wish to advise you that in my opinion the Acts of 1915, page 130, at the time of its attempted passage, was unconstitutional and void as violative of Section 96 of the Constitution of Alabama.

Section 96 of the Constitution of Alabama provides as follows:

"Section 96: The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

You will note that the Acts of 1915, page 130, provide as follows:

"Section 1. That witnesses in criminal cases in the county court and in the circuit court of Marion County, Alabama, and before the grand jury of said county, are entitled to fifty cents per day and two and one-half cents per mile to and from their residence by the route usually traveled."

"Section 2. The fees of such witnesses subpoenaed on the part of the State, who appear in the county court or in the circuit court or before the grand jury of said county, shall be a preferred claim against the fine and forfeiture fund of the county; and, provided, that if said fund shall be exhausted at the time of the presentment of certificate for said fees, then such fees shall be paid out of the general funds of the county."

You further refer in your request to the Acts of 1919, Section 1 which proposed to amend the Acts of 1915 above referred to, only in the following manner:

"Section 1. That the Act to fix and regulate the fees of witnesses in criminal cases in the county court and circuit court of Marion County, Alabama, and before the grand jury of said county, and to provide for the payment thereof, approved August 21st, 1915, be amended so as to read as follows:

"Section 1. That witnesses in criminal cases in the county court and in the circuit court of Marion County, Alabama, and before the grand jury of said county, are entitled to one dollar per day and five cents per mile to and from their residence by the route usually traveled."

"Section 2. That all laws, general, special, or legal in conflict with the provision of this Act be and the same are hereby repealed."

"Approved August 22, 1919."

At the time of the adoption of the above quoted 1919 Act and of the passage and adoption of the above quoted 1915 Act, Section 6659 of the Code of 1907, provided as follows:

"Section 6659: FEES AND COMPENSATION OF WITNESSES:—Witnesses in criminal cases are entitled to one dollar per day and five cents for each mile to and from their residence by the route usually traveled, and all necessary ferriages and toll."

You will note that the 1915 Act was in conflict with provisions of above quoted Code Section from the 1907 Code. Section 6659 of the Code of 1907, above quoted, was a general law at the time of its enactment and intended to apply in every county in the State. Further, this law applies to costs, fees of the courts in each and every county of the State and left no field of operation for any local law on this subject. Further, the Act of 1915, above quoted was in violation of the Constitution of Alabama, Section 96, above quoted, in that, the same proposed to change the amounts of charges of

court in the county of Marion, Alabama, contrary to the provisions of the above quoted Section of the Constitution.

I wish to further refer you to the case of **Vaughan v. State**, 212 Ala. 461, 103 So. 38.

With reference to the Acts of 1932, referred to in your request, the Act on page 102 of said Acts, provides as follows:

"Section 1. That section 3762 of the Code of Alabama, 1923, be amended so as to read as follows: 3762: **FEES AND COMPENSATION OF WITNESSES**. Witnesses in criminal cases are entitled to seventy-five cents per day and five cents for each mile to and from their residence by the route usually traveled, and all necessary ferriages and toll.

"2. That the provisions of this Act shall go into effect immediately upon approval of the Governor. Approved October 19, 1932."

It is my opinion that the Acts of 1932 above quoted amend Section 3762 of the Code of 1923 and constitutes the present law governing the payment and the amount of witness fees in cases in the criminal courts of Alabama.

In reply to your fourth question, I wish to advise that it is my opinion that claims of witnesses summoned by the State and appearing on the part of the State should be paid from the fines and forfeitures in the county treasury. I wish to refer you to Section 3769 of the Code of Alabama (Mitchie's Code 1928), which provides as follows:

"3769. Witness' certificates; how payable, clerk not entitled to fee for issuing.—It is the duty of the clerk of the court to issue a certificate to each witness appearing on the part of the state, stating therein the amount of compensation to which he is entitled, the facts which, under the provision of Section 3763 (6660), make it a good claim against the county, which certificate is payable by the treasurer out of any fines and forfeitures in the county treasury; the clerk who issues the certificate hereinabove mentioned shall not be entitled to demand or charge any fee for performing the duty."

You will note that this section provides not only the means and the method of paying for witness claims, but states from what source witness fees in criminal cases for witnesses appearing on the part of the State shall be paid.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 23, 1937.

Hon. T. L. McKee,
Tax Collector,
Chilton County,
Clanton, Alabama.

Taxation—Homestead Exemptions—

Act 107, General Acts, 1936-37, page 113.

Tax Collector is authorized to honor credit certificate issued to taxpayer by the tax assessor for homestead exemption, and to credit

the taxes of such taxpayer with the amount of the original certificate or a duplicate thereof, but not to exceed the exemption provided by law.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"The Tax Assessor of Chilton County, Alabama and the State Tax Commission of Alabama have certified to me as Tax Collector of Chilton County, Alabama, an Abstract showing the total amount of taxes, charged to each individual tax payer of Chilton County, Alabama, for the tax year of 1937. Said abstract does not show any credit for homestead exemptions.

"The Tax Assessor of Chilton County, Alabama is now issuing to the several tax payers of Chilton County, Alabama who are bona fide residents of said county, owning homesteads, as such, a certificate a copy of said certificate being hereto attached and ask to be made a part of this request.

"Will I as Tax Collector of Chilton County, Alabama be authorized to accept from each of said tax payers said certificate and give credit for the amount shown therein in payment of his, or her taxes, as shown on said abstract?"

It is my opinion that you are lawfully authorized to honor the credit certificate or memorandum issued by the tax assessor to the taxpayer for homestead exemption and to credit the taxes of such taxpayer with the amount of the original certificate or a duplicate thereof, but not to exceed the exemption provided by law.

Section 31 of an act entitled "An Act to provide for the general revenue of the State of Alabama," as amended, General Acts of 1936, page 4, requires that homestead must be separately listed and valued. This act was approved on March 12, 1936.

The Legislature, by Act No. 107, approved Feb. 20, 1937, said Act appearing in the General Acts 1936-37, page 113, granted an exemption to homesteads from state taxes. The exemption granted under this act applies to taxes due October 1, 1937 and which were assessed October 1, 1936. In re: OPINION OF THE JUSTICES. 175 So., 690.

The failure of the tax assessors separately to list and value the homestead and to credit the taxpayer with an amount equal to the state taxes on such homestead necessitated, after the rendition of the foregoing opinion, issuance of a proper credit on the amount of the taxes certified by the tax assessor to the tax collector as being due by the taxpayer. A certification without such credit was an error on the part of the tax assessor which he is authorized to correct.

It is the duty of the tax collector to give the taxpayer the benefit of the exemption which the Legislature granted and to correct the amount of the certification by crediting the taxes of such taxpayer in an amount equal to that certified by the tax assessor as shown on the original certificate of credit or on a duplicate thereof but within lawful limits.

Yours very truly,

A. A. CARMICHAEL,

Attorney General,

September 23, 1937.

Hon. J. S. Sandlin,
Sheriff, Morgan County,
Decatur, Alabama.

Jails—County is liable for upkeep of refrigerator when it is kept in jail but not when it is kept in sheriff's home.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of September 8, 1937, which is as follows:

"I have purchased an ice box for the county jail to preserve food served to prisoners.

"I purchase ice to preserve the food served to the prisoners and also for ice water served prisoners.

"I have presented the County Board of Revenue with the cost bill of the purchase of the Ice Box and also with a cost bill for the ice they have disallowed these bills.

"Kindly render us an opinion whether or not the Board of Revenue should approve these bills, also if I had or should purchase an electric ice box, should the Board pay for the box and for the electric current used for its operation."

You fail to state whether the refrigerator is kept in the jail or in the sheriff's home. This office has repeatedly ruled that if a refrigerator is part of the equipment of the kitchen of the County jail, then the county is liable for its upkeep.—**Opinions of Attorney General**, Book 6-A, page 58 (Off. Ed.). This office has also ruled that a county has authority to purchase a refrigerator as a part of such equipment.—**Opinions of the Attorney General**, Book 4-A, page 42 (Off. Ed.). However, if the refrigerator is kept in the home of the sheriff, I know of no authority to pay for its upkeep.—**Opinion to I. I. Moses**, Chairman of Russell Court of County Commissioners, under date of August 16, 1937.

The same reasoning applies to an electric refrigerator.—**Quarterly Report of Attorney General**, Vol. I, page 334.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 23, 1937.

Hon. F. B. Thompson,
Judge of Probate,
Clay County,
Ashland, Alabama.

Person doing laundry work in own home for an indefinite number of persons is not subject to a laundry license as provided by Schedule 79 of 1935 Revenue Act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your letter of August 24, 1937, as follows:

"Not long since our license inspector cited Mrs. H. C. Baggett, of this town, for operating a laundry without a license and after this citation was served Mrs. Baggett obtained a license to operate a laundry in this town. After paying for this license Mrs. Baggett wrote the State Tax Commission about it and Mr. Tucker of that department wrote her a letter that if she did this work in her own home she was not liable for this license.

"I understand that she does this work in her home and has contract to do work for the CCC boys in camp here and that she has one or two electric washing machines which she uses in this work. It is not known whether she does the ironing by hand or not, nor does it appear that she seeks to do or does do any work for the public outside of that above named.

"Basing her request upon the letter received by her from Mr. Tucker, Mrs. Baggett wishes to have the money refunded and the license cancelled and I write to ask your opinion relative to same."

I am of the opinion that the lady about whom you inquire is not subject to the payment of a license for operating a laundry as she comes within the exception to Schedule 79 of the 1935 Revenue Act, which provides in part as follows:

"* * * provided that no license shall be required of persons commonly designated 'Wash-woman'. * * *"

Webster's New International Dictionary, Second Edition at page 2879, defines a washerwoman as follows: "A woman who works at washing clothes or who takes in family washings." It is, therefore, my opinion that from the facts in your letter this person comes within the classification of a "wash-woman" and is exempt from the payment of a laundry license.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 23, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Montgomery, Ala.

Taxation — Municipality cannot share special county road tax, Constitution Section 215. Sections 1807, 2150 and 6774, Code of Alabama, 1923.

(1) Court of County Commissioners or other governing body is not lawfully authorized to pay municipality any portion of special road and bridge tax levied pursuant to subdivision (a) of Section 215 of the Constitution.

(2) If county has paid municipality any portion of special road and bridge tax levied pursuant to subdivision (a) of Section 215 of the Constitution, the amount thereof may be recovered within the time and in the manner provided by law.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"Please refer to Section 215 of the Constitution, Section 2150, Code of 1923, any other Section of the Code or subsequent legislation relative to cities participating in taxes levied by Counties and 190 Alabama Reports, page 366, and advise me as follows.

"1. Would cities be entitled to any part of the two and one-half (2½) Mills levied as above?

"2. If a county has paid a part of such tax to a city and same should not have been paid, could same be recovered from such city?"

Answering the above inquiry, it is my opinion that the Court of County Commissioners or other county governing body is not lawfully authorized to pay any municipality within the county any portion of the special road and bridge tax levied pursuant to subdivision (a) of Section 215 of the Constitution, and that if such payment has been made, recovery of the amount so paid, may be had by appropriate action brought within the time required by law.

There are apparently three conflicting sections appearing in the 1923 Code of Alabama. I quote each section as follows:

"Section 1807. Road and bridge tax for county apportioned to city.—In any county where a property tax is assessed and collected by the county authorities for the construction or maintenance of public roads and bridges in the county, the board of revenue or court of county commissioners shall each year cause to be drawn a proper warrant payable to each city in such county having within its corporate limits territory taken in under the provisions of this article, such warrant to be for an amount equal to one-half of the road and bridge tax paid to the county on property within the corporate limits of such city. The council or governing body of such city shall use the money so paid to it by the board of revenue or court of county commissioners in keeping up and maintaining the public roads, streets, highways, and bridges, and in opening new roads, streets, highways, and constructing new bridges in the territory brought within the corporate limits of the city under the provisions of this article, the surplus of such funds, if any, to be used in keeping up and maintaining streets, highways, and bridges, in any other part of the city that the board or governing body of the city may direct."

"Section 2150. Taxes; special road or bridge; one-half to municipality.—Courts of county commissioners and boards of revenue of the county where there is levied a special road and bridge tax, or either, shall pay over, each year, to each municipality therein, one-half of the money collected on such road and bridge tax, or either, on the property located in such municipality; such sums, when paid over to the municipality, shall be used exclusively for the purpose of maintaining the streets and bridges in the corporate limits of such municipi-

pality. Any money derived from a levy of a special bridge tax not expended by the municipality in maintaining the bridges within its corporate limits, in any year, shall be returned to the board of revenue or court of county commissioners, and credited to the county bridge fund for the purpose of maintaining bridges of the county, outside the corporate limits of such municipality."

"Section 6774. One-half road tax collected in municipalities to be paid to city.—The courts of county commissioners and boards of revenue, where there is levied a road tax, general or special, or where by the tax levy a portion of the tax is levied for or devoted to the purpose of constructing, repairing or maintaining roads and highways of any description in the county **except the special tax authorized by subdivision (a) of section 215 of the Constitution**, shall pay over each year to each municipality therein one-half of the money collected on such road tax on the property located in such municipality." (Emphasis ours.)

It is not pertinent to this opinion for me to decide which one of the aforementioned code sections is now in effect because the county commissioners are not lawfully authorized by either code section to pay to a municipality within the county any portion of the special two and one-half (2½) mill tax levied pursuant to subdivision (a) of Section 215 of the Constitution of Alabama.

With reference to the authority of the first two aforementioned code sections, the Supreme Court of Alabama, in the case of *County of Montgomery v. City of Montgomery*, 190 Ala. 366, 67 So. 311, held that the legislature of Alabama is without authority to apply the tax, since the Constitution commands that funds so garnered shall be applied to public county roads, not to urban ways, I quote from the opinion as follows:

"(1) In the several decisions it has been decided here, after repeated full consideration of the question, that the application of a special road tax, levied and collected within the purview of section 215 of the Constitution of 1901, cannot be controlled by legislative enactment, since the Constitution commands that funds so garnered shall be applied to public county roads, not to urban ways.—*City of Tuscaloosa v. Court of County Commissioners of Tuscaloosa*, 173 Ala. 724, 54 South. 763 (a ruling based on opinion in *Board of Revenue v. State ex rel. City of Birmingham*, 172 Ala. 138, 153-155, 5 South. 757); *Pike County v. City of Troy*, 173 Ala. 442, 56 South. 131, 274; *Commissioners' Court of Tuscaloosa County v. State ex rel. City of Tuscaloosa*, 180 Ala. 479, 61 South. 431. It follows, from the doctrine of these decisions, that section 1335 of the Code of 1907 (as readopted by the act of August 26, 1909, Acts Sp. Sess. 1909, p. 174), which purports to alone deal with a special road and bridge tax, was and is constitutionally invalid.—*Constitution 1901, Section 215, Div. (a).*"

Section 6774, *supra*, specifically excludes any attempt on the part of the legislature to apply the tax levied pursuant to subdivision (a), Section 215 of the Constitution.

The Commissioners' Court, in making application of the special tax in the manner indicated in your letter or inquiry, disobeyed the Supreme Court construction of legislative authority as set forth in Sections 1807 and 2150, and also disobeyed the plain and unambiguous terms of Section 6774. The payment to the municipality was therefore unlawful and without authority of law.

I premit any discussion as to the right of the county commissioners to pay to the municipality any portion of the general tax of five mills which may be levied pursuant to Section 215 of the Constitution, for road and bridge purposes. This question is not presented for determination.

The county may recover by appropriate action within the time required by law the money which was unlawfully paid to the municipality. **Mobile County v. Williams, Judge**, 180 Ala. 639, from which I quote paragraph 5, page 648, as follows:

"5. There appears to be no doubt about the proposition, so far as the laws of Alabama are concerned, that when a public officer collects money from a county, as fees or compensation for services rendered by him, and to which fees or compensation he is not legally entitled, such county can maintain a suit for the recovery of the money so illegally obtained by him and recover the same. We can properly quote as applicable to the facts of the present case the following from the Supreme Court of Indiana: 'The rule preventing the recovery of money voluntarily paid has no application under the facts in this case. As charged in the complaint, the claims were allowed and the money paid, without any legal authority for so doing. In view of the alleged facts, those claims were not only allowed in violation of law, but they were presented by the appellee, and the money of the county unlawfully received by him, and he is chargeable with knowledge of the illegal acts. It was no payment by the county.

"The latter, as the principal, had no part in the payment. It could not, as a public corporation, be held to the consent to the payment of, or expenditure of, the public money in defiance of law. Awarding to the appellee this money, under the alleged facts, was in a legal sense equivalent to an unlawful appropriation of the county's money to his own use by the aid of its board of commissioners. The allowance and payment of the money being unlawful, the commissioners did not act within the scope of their authority and therefore did not bind the county.' **Commissioners v. Heaston**, 144 Ind. 583, 41 N. E. 457, 43 N. E. 651, 55 Am. St. Rep. 192; **Board v. Ellis**, 59 N. Y. 620, **Lee v. Board, etc.**, 124 Ind. 214, 24 N. E. 986; **McElrath v. United States**, 12 Ct. Cl. 201, **American S. Co. v. Young**, 89 Pa 186, 33 Am. Rep. 748; **Dew. v. Parsons**, 2B. & Ald. 562; **Stut v. Williams**, 8 Exch. 625; **Fire Ins. Co. v. Britton**, 8 Bosw. (N. Y.) 148; **Ogden v. Maxwell**, 8 Blatchf, 319, Fed Cas. No. 10, 458; **Comer v. Board of Com'rs of Morgan County**, 32 Ind. App. 477, 70 N. E. 179; **State ex rel. Board of Com'rs of Tippecanoe County v. Flynn**, 161 Ind. 554, 69 N. E. 159."

The claim of the county must be properly presented to the municipality within the time required by law. **Montgomery County v. City of Montgomery**, 195 Ala. p. 197.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 23, 1937.

Hon. C. J. Allen, Superintendent,
Calhoun County Schools,
Anniston, Alabama.

1. County Board of Education—may not legally contract with teacher for services at a school, where assignment of such teachers is rejected by unanimous vote of Board of School Trustees or such school.

2. Board of School Trustees—must act as board and not as individuals.

3. Board of School Trustees—unanimous vote rejecting assignment of teacher not affected by purported rescission of one of board, while not acting in conjunction with the other members of the board and not at a meeting thereof.

4. Board of School Trustees—unconditional resignation of member effective without acceptance by the County Board of Education.

5. County Superintendent of Education—upon rejection of assignment of teacher, County Superintendent of Education must nominate another teacher for said school.

6. County Superintendent of Education—has no authority to place upon the payroll as teacher of a school the name of a teacher whose assignment was rejected by unanimous vote of Board of School Trustees of such school.

7. President of Board of Education has no legal authority to approve payroll containing name of teacher whose assignment rejected by unanimous vote of the Board of School Trustees.

8. Custodian of County School Funds—Duties and liability thereof—Personally liable for paying claim, if, from the records or otherwise, evidence is brought home to him that claim is in fact illegal, although approved by the County Board of Education.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of August 6, 1937, in which you request my opinion as follows:

"On May 28, 1937, I, as County Superintendent of Education of Calhoun County, Alabama, recommended to the Board of Education for employment for the session of 1937-38, many teachers. Among those recommended and approved was a teacher of vocational agriculture for the White Plains High School for a term of one year beginning July 1, 1937. The trustees of said school were notified on same day of the assignment of the teacher.

"Before the expiration of ten days—June 7,—the board of local trustees unanimously rejected the assignment of the teacher and notified me, in writing, giving their reasons for such refusal. Later, June 21, one of the trustees filed an instrument in writing with me purporting to rescind his action in joining with the other two trustees in refusing to accept the assignment of the vocational teacher. On June 24, this

trustee also filed his resignation in writing, which resignation has never been accepted.

"The County Board of Education held a regular meeting on June 25, 1937 at which time all three of the above named written articles were read in open meeting. (Copies of each are enclosed for your information). The Board of Education assumed that unanimous refusal of assignment of said teacher no longer existed and authorized his employment. The teacher has now worked a month and filed his report for payment. The Board of Education requested that I place the matter before you for a ruling because one person has stated that it is his intention to take legal action against either or all of the following: County Superintendent of Education, The Custodian of County School Funds, or the members of the County Board of Education.

"With the above facts before you we request your immediate opinion upon the following questions:

"1. Does the County Board of Education have a legal right to contract with the teacher in question?

"2. Does the County Superintendent of Education have authority to place the name of said teacher upon the pay roll of this county?

"3. Has the president of the Board of Education legal authority to approve a pay roll with the name of said teacher upon it?

"4. Does the Custodian of county school funds incur any liability either personally or upon his official bond if he should issue a check to said teacher after a pay roll shall have been prepared by the County Superintendent and approved by the President of the Board of Education?

"Since the name of the teacher is being left off the payroll until your opinion is rendered we shall thank you to give this matter an early consideration."

Before considering the facts set out by you, I call your attention to some of the provisions of the Alabama School Code of 1927 applicable to this situation.

Under the provisions of Section 161, the County Superintendent of Education must nominate in writing, for appointment by the County Board of Education, all principals and teachers, and must assign them to their positions. Section 117 provides that the County Board of Education shall appoint all teachers, upon such written recommendation of the Superintendent. These sections were construed by the Court of Appeals in the case of **Board of Education v. Watts**, 19 Ala. App. 7, 95 So. 498. (Cert. Den. by Supreme Court, 209 Ala. 115, 95 So. 502), and it was there held that the nomination by the Superintendent was essential and without such nomination the county board had no authority to employ a principal.

There is another essential provided by the School Code Section 133 as amended by the Acts of 1935, p. 1090, requires the County Board of Education to appoint, from persons nominated by the patrons, a Board of School Trustees of three persons for each school. The Board of School Trustees is regulated by Article VIII, (Sec. 178-187) of the School Code of 1927. Section 180 provides:

"The Board of School Trustees may by unanimous vote refuse to accept the assignment of any teacher within ten days from the date of

"the Superintendent's notice of assignment, upon written notification to the County Superintendent of Education setting out the reason for such refusal, and it is hereby made the duty of the County Superintendent of Education to nominate another teacher for such school."

I now proceed to consider the facts set out by you in your letter. On May 28, 1937, you recommended the employment of a teacher to be assigned to the White Plains High School. Within ten days, the Board of Trustees of such school duly notified you "that we have and do, by unanimous vote, refuse to accept the assignment" of said teacher, and gave their reason for refusing to accept such assignment. On this date, June 7, 1937, therefore, it became your duty under Section 180 of the School Code to nominate another teacher for such assignment, and the County Board of Education had no authority to employ that teacher for assignment to the White Plains High School.

Apparently nothing was done by you towards nominating another teacher as required by Section 180, but the matter was allowed to remain in status quo for two weeks, at which time you received the following letter:

"Choccolocco, Ala.
R. F. D. No. 1,
June 21, 1937.

"Mr. C. J. Allen,
Superintendent, Calhoun County Schools,
Anniston, Alabama.

"Dear Sir:

"This is to certify that the trustee, or trustees, whose name or names appear below now request that the paper filed by the trustees of White Plains on June 7, 1937 refusing the assignment of Mr. J. C. McClinton as teacher of Vocational agriculture in said school for 1937-38 be now cancelled. No longer do I, or we, refuse said assignment.

Respectfully, (Signed)
W. J. HARPER
As trustee or trustees of
White Plains High School."

Three days following this letter, this trustee wrote you saying "Please accept this as my formal resignation as trustee of the White Plains High School." On the following day, June 25, 1937, the County Board of Education met, and, without accepting such resignation but with full knowledge of it, authorized the employment of the teacher in question.

One question to be considered is the effect of the tender of resignation. If this was effective without formal acceptance, it is clear the Board of Education had no authority to employ the teacher in question, for the remaining trustees of the school unanimously declined to accept the appointment. Therefore, if the resignation was effective, there remained a unanimous disapproval of the assignment by all of the trustees. It is my opinion that such resignation was effective without formal acceptance. *State ex rel Almon v. Fowler*, 160 Ala. 186, 48 So. 985; *State v. Fitts*, 49 Ala. 402.

Compare opinions of the Attorney General, Biennial Report 1928-30, holding that such school trustees are not appointed for any definite period and the County Board of Education may revoke such appointment at any time.

Under the provisions of the School Code, the Board of School Trustees are the representatives of the patrons of the school. Their powers are vested in the board and not in the trustees as individuals. Annual meetings, regular meetings and special meetings are required by Section 178.

"Where this is the law, the great weight of authority is to the effect, that, in the selection of principals and teachers of schools, the board must act as a board and not as individuals. It would make no difference what one or more of the members said or did with reference to a school matter outside and at another time, it is only when acting in conjunction with the other members of the board and at a meeting thereof, that they can in anyway bind the board." Per. Samford, J. in **Board of Education v. Watts**, 19 Ala. App. 7, 95 So. 498.

This statement as to employment of teachers by the county board is equally applicable to the refusal of their assignment by the Board of School Trustees. This is strengthened by the language of Section 180, supra: "by unanimous vote," clearly contemplating an official meeting of the Board, not the unofficial, individual acts of the members thereof. It is, therefore, my conclusion that the letter of June 21, 1937, signed by one of the individual members of the Board of School Trustees, but outside and at another time than the meeting of such board, and not in conjunction with the other members of the Board, does not in any way bind the board or affect the unanimous vote of the Board refusing to accept the assignment of the teacher in question. Such unanimous action of the Board of School Trustees remaining effective, it follows that the County Board of Education had no authority to employ such teacher for that school.

From these conclusions, I give the following answers to your questions:

1. The County Board of Education has no legal right to contract with the teacher in question for the services at the White Plains High School. No facts are set out in your letter which would prohibit the employment of that teacher at some other school.
2. Under the facts set out in your letter, the County Superintendent of Education has no authority to place the name of said teacher upon the pay roll of the county.
3. The president of the Board of Education has no legal authority to approve a pay roll with the name of said teacher upon it.
4. Your final question is whether the Custodian of county school funds would incur any liability either personally or upon his official bond if he should issue a check to the teacher in question. For a breach of his official duties, he would be liable both personally and upon his official bond. The duties and the liability of the custodian of County School Funds under the Act of 1935 (General Acts 1935, p. 1090) are the same as those of the County Treasurer of School Funds under Section 94 of the School Code of 1927. Quarterly Report Vol. II, p. 29, 174.

The liability of said Treasurer is determined by the rule laid down by the Supreme Court in **Mobile County v. Williams**, 61 So. 963.

"When there are, either upon the face of the claim or upon the records of the Court of County Commissioners or otherwise, evidence brought home to the county treasurer that a claim, although allowed by the Court of County Commissioners, is in fact invalid, then it is the duty of such treasurer to refuse to pay such claim and to present, on behalf of the

county, the defense of such county to such claim. If he pays such a claim he does so at his peril."

See also Biennial Report, 1928-1930, 589 @ p. 590.

In regard to the payment of compensation to the teacher in question for the time he has actually worked, I wish to refer you to an opinion of this office rendered to the Judge of Probate of Elmore County on July 17, 1935, a copy of which is herewith enclosed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 23, 1937.

Senator G. R. Swift,
Atmore, Alabama.

Gross Receipts Tax--Not applicable to co-operative purchase in interstate commerce of commodities in carload lots by groups of individuals for their own use.

Opinion by Assistant Attorney General Bibb.

Dear Sir:

I wish to acknowledge receipt of your letter of August 11, in which you state:

"An individual, say a farmer, clerk, insurance salesman, or any private person not **'operating or maintaining one or more retail store or retail mercantile establishments within the State'**, handles such commodities as seed potatoes or fertilizer in car load lots, ordering the same partly for himself and partly for his neighbors, the seed potatoes and fertilizer being parcelled out in most instances at the car door, various persons taking their share and settling with the one who had ordered the car load.

"In other words, a sort of pool would operate. One man would order the car load of seed potatoes or fertilizer. This car load would be shipped to him from out of the State, moving in Interstate Commerce, and the commodity would be distributed as the car was unloaded, there never being any process of retailing in so far as being in any way connected with any **'retail store or retail mercantile establishment'**,"

and ask my opinion whether such a transaction would be subject to the gross receipts tax, Acts 1936-37, Extra Session, page 1.

The Act in question levies a license or privilege tax upon "every person, etc, opening, establishing, operating or maintaining one or more retail stores or retail mercantile establishments * * *" equal to 1½% of the gross sales of said business. The instance you mention appears to be but the cooperative purchase in interstate commerce of commodities in carload lots by groups of individuals for their own use, the delivery of the car being made to one of the group and apportionment of the various shares being made from the car on the railroad siding. It is my opinion that such a transaction is not subject to this gross receipts tax.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 23, 1937

Hon. E. B. James,
Supt. of Education,
Perry County,
Marion, Alabama.

Where salary of Superintendent of Education is not fixed under the Local Act 301, 1931 Legislature, until Superintendent assumes office, Board is authorized to meet and fix salary.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your request of March 3, 1937, as follows:

"I was recently elected to the County Superintendency of Education in Perry County, under the Provision of a Local Acts Bill passed in the 1931 session of the Legislature. Under a ruling from your office I assumed the duties of the office on November 10, 1936.

"Since assuming the office, there has been quite a bit of discussion as to my salary. I have been somewhat at a loss as to what amount I am legally entitled to draw, for my salary.

"Below I state the facts and enclose resolutions taken from the minutes of the Board meetings. I will appreciate very much if you will give me a ruling in the matter.

"In a Board meeting on January 30, 1934, the following resolution was adopted and approved establishing the salary for the office of superintendent in this county. The resolution from the January 30, 1934 meeting is as follows:

" 'It was reported to the Board by the Superintendent that his salary for his term of office beginning July 1, 1933 had not yet been fixed by the Board, and the President of the Board stated that he had not urged this matter because he did not think the Board had been in position on account of the uncertainty of business conditions to intelligently say what would be a fair salary for the Superintendent, especially in view of the fact that the salary fixed by the Board would have to remain for the four year period. After a discussion of the matter the following action was taken by the Board: That the salary of the Superintendent for the year 1933-34 be fixed at \$2750.00 and that an appropriation of \$300.00 be made to the Superintendent to assist in the purchase of an used car from Progressive Chevrolet Co., Marion, Alabama, and that \$101.80 be appropriated for his travel expense and that he be furnished 110 gallons of gasoline and three gallons of motor oil per month. And for the other three years of his term his salary be fixed at \$2750 per year and that he be furnished with 110 gallons of gasoline and three gallons of Motor Oil per month.'

"On November 4, 1936 the day following the General Election, the Board in session adopted a resolution in regards to the salary of the incoming Superintendent. The following resolution was written by the County Superintendent who was Secretary of the Board and is in the minutes of the November 4, 1936 meeting:

" 'The Superintendent reported to the Board that under an opinion rendered by the Attorney General on October 23, 1936, the present Superintendent's term of office would expire on November 9, and under the law the Board of Education must fix the salary of the new Superintendent prior to the time of his taking office. After a discussion of the Board the Superintendent having excused himself from the meet-

"ing, and upon motion by Mr. A. R. Oxford, seconded by Mr. E. C. Levert, and unanimously adopted, the salary of Mr. E. B. James, Superintendent Elect, was fixed at \$2500.00 per year for the term of four years; and he to bear the expense of supervision and office help or any other assistants.'

"The Board was in session again on February 11, 1937. The minutes of the meeting on November 4, 1936, were read. The members of the Board stated that the resolution regarding the Superintendent's salary, included provisions which were not adopted or passed upon in the meeting of November 4, 1936. With this in view the Board disapproved and declared void the minutes of the November 4, 1936 meeting. The resolution of the meeting of February 11, 1937 disapproving the minutes of the meeting on November 4, 1936 is as follows:

" 'The minutes of the meeting of November 4, 1936 were read, by the President, and, after some discussion A. R. Oxford, introduced a motion, which was seconded by W. P. Fuller, that the minutes of the meeting on November 4th be disapproved, and declared void. The President put the question to a vote and the motion was unanimously carried.'

"Then the Board was of the opinion that a salary had not been fixed for the Superintendent unless the salary of the office before the election would remain in force. The following is the result, and the resolution of the meeting on February 11, 1937 regarding the salary of the office:

" 'There was some discussion as to the salary of the Superintendent of Education. Mr. Frank Gordon, Attorney for the Perry County Board of Education, was called in to give his opinion regarding the salary of the Superintendent of Education. He quoted several opinions which had been handed down by the Attorney General, and upheld by the Supreme Court, whereby the Board of Education did not have the authority to make a change in the salary for the Superintendent of Education. He then gave as his opinion, that the salary of said office should remain the same that it had been during the past term.

" 'A. R. Oxford brought up the question of expense of travel for the Superintendent. He stated that expenses had been allowed the former Superintendent and that it should be allowed the present Superintendent. E. C. Levert and W. P. Fuller agreed that the expense allowed was not to be discontinued. After the discussion the Board went on record authorizing the Superintendent expense allowance for all travel in connection with official business. The Superintendent stated that he did not think the expense allowed could be legally authorized. W. P. Fuller then moved that the salary of the Superintendent of Education be \$2750 per year from the time the term of office began, which was November 10, 1936. This motion was seconded by A. R. Oxford. The motion was then put to a vote by the President and was passed by unanimous vote.'

"To date I am at a loss as to what I am legally to collect as a salary.

"I would like to have a ruling on the following questions:

"Will the salary of the former superintendent remain in force after I assumed the office November 10, 1936 under a ruling from your office? If so, what is the salary, as taken from the resolution of the meeting on January 30, 1934? Is the 110 gallons of gas and three gallons of motor oil per month, a part of the salary and just an addition to the cash

"part of the salary? If that is the ruling will I be entitled to get the 110 gallons of gas and three gallons of motor oil per month in addition to the cash part of the salary? If this is not the salary, then, under the resolutions that have been drawn, what am I entitled to collect as a salary? When the salary is established when am I entitled to start drawing that salary? Will it be as of November 10, 1936 when I assumed office?

"I have stated the facts of the case as I know them and as I have gotten from the enclosed resolutions taken from the minutes of the meetings. If you should want the minute book in making a ruling I shall be very glad to bring it to Montgomery. I was in your office a few days ago and talked the matter over with Mr. Screws. I explained, in detail, the case to him at that time, and told him that I would ask for an opinion."

I am of the opinion that no salary has been set and that the board should meet and fix the salary for the Superintendent of Education. Local Act No. 301, of the 1931 Legislature (p. 146) provides that the salary of the superintendent shall be fixed by the County Board of Education at not less than Two Thousand Dollars (\$2,000) per annum. While the salary should be fixed prior to the beginning of the term (Sec. 149, 1927 School Code) nevertheless, where the Board fails to fix the salary before the beginning of the term, it may fix the salary after the beginning of the term. 46 C. J. 1025, *Breathitt County v. Noble*. (Ky.) '1166 S. W. 777.

As the meeting on November 4, 1936 was illegal and its action null and void, according to the statement of facts, the salary was not fixed prior to your incumbency and the board was authorized to meet and fix the salary. It did hold a meeting on February 11, 1937 and adopted a resolution, but that motion was apparently passed under a misapprehension of the rights and duties of the board, and its powers and authority, and was therefore not a free and clear expression by the Board.

I am therefore of the opinion that the Board should meet and set a salary for the Superintendent of Education in accordance with Local Act 301, supra. Such salary would be in effect from the beginning of your term.

The Board would be permitted to make an allowance for expenses, as part of the salary of the Superintendent of Education.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 23, 1937.

Hon. T. B. Bennett,
Tax Collector,
Choctaw County,
Butler, Alabama.

Tax Assessors & Tax Collectors—

Commissions of Tax Assessors paid out of first monies collected by Tax Collectors (a) Amount of Homestead Exemptions for tax year 1936-37 should be estimated by Tax Collector and deducted in estimating commissions due to be paid Tax Assessor out of first monies

collected. (b) When the amount of Homestead Exemption has been determined exactly, the matter can be definitely adjusted. (c) Commissions lost by exemptions of homestead paid out of Property Tax Relief Fund.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of August 2, 1937, which is as follows:

"Please tell me under the law: just how should I settle with the Tax Assessor on Commissions? The law says pay him out of the first monies collected. Since we can not tell the amount of the Homestead Exemptions; How can we arrive at the correct amount? I will thank you for any information that you can give."

The commissions of the Tax Assessor are paid out of the first monies collected by the Tax Collector. (See Section 22 et seq. of the Revenue Act of 1935).

The Homestead Exemption law is applicable to taxes assessed as of October 1, 1936, and payable as of October 1, 1937.—**Opinion Of the Justice (MS)**. When these assessments were made the Homestead Exemptions were not taken into consideration in most instances. Therefore, it became necessary to file said exemptions subsequently. It will probably be March, 1938, before the amount of Homestead Exemption can be determined finally.

The commissions of the Tax Assessors and Tax Collectors lost by the exemption of homesteads are payable out of the Property Tax Relief Fund, (Acts 1936-37, page 142). The Tax Assessor would, therefore, not be paid commissions on property exempt as homesteads by the Tax Collector out of the first monies collected by him.

In view of the above, the question presents itself as to the proper method of payment of the Tax Assessor's commissions by the Tax Collector out of the first monies collected. The only practical method to follow would be for the Tax Collector to estimate the amount of Homestead Exemptions and deduct same from the commission due otherwise to the Tax Assessor. In other words, the Tax Collector should deduct the estimated amount of commissions on Homestead Exemptions from the total amount of commissions which would otherwise be due the Tax Assessor, and pay to the Tax Assessor the proper commission on the difference out of the first monies collected. When the total amount of the Homestead Exemptions have been determined finally, the matter can be adjusted accordingly.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 24, 1937.

Hon. Charles W. Lee,
State Comptroller,
CAPITOL.

Act No. 225, Special Session, 1936-37 (Acts of Special Session, 1936-37, page 268).

1. Clerk not entitled to costs on preliminary investigation under said act where there is an acquittal or nol pros.

2. Insofar as said act is retroactive, it violates Section 100 and Section 68 of the Constitution of 1901 and is unconstitutional and void.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Please refer to Act No. 225 Merrill—approved March 2, 1937.

"1. Under this Act would the Clerk be entitled to Fine and Forfeiture claim for \$2.00 where there is an acquittal or nol pros in misdemeanor cases in the County Court?

"2. If entitled to Fine and Forfeiture claim of \$2.00, does this act ratify claims heretofore issued not to exceed \$2.00?"

The act referred to appears in the printed Acts of the Extra Session of 1936-37 at page 268. This act provides:

"Section One: In all criminal cases where the Judge of the County Court shall sit as committing Magistrate, the Clerk of the County Court shall act as Clerk to such committing Magistrate in said proceedings, **and when the defendant is subsequently convicted** and sentenced to the penitentiary or to hard labor, the Clerk of the County Court shall be entitled to a fee of Two Dollars to be taxed in the bill of costs in the same manner and paid out of the same fund, at the same time and in the same way as is provided by law for the payment of other items of costs incurred by the State."

You will note that under the language of this section the right of the Clerk to costs is conditioned on the defendant being subsequently convicted. It is therefore my opinion that the Clerk is entitled to no fees under said act where there is an acquittal or nol pros.

As to your second question, my answer is also in the negative. Section 2 of said Act provides as follows:

"Section Two: All payments not exceeding the sum of Two Dollars in each case heretofore collected by the Clerk of the County Court in such proceedings are hereby ratified."

This section attempts to make a charge that was illegal at the time it was made a legal charge by a subsequent act of the Legislature. As to any costs collected by the Clerk of the County Court before the date of such act, such collections were without authority and resulted in an obligation or liability of the Clerk to the State or county. Under the provisions of Section

100 of the Constitution of Alabama of 1901 the Legislature may not by subsequent act release, extinguish or remit any obligation or liability due and owing to the State, county or other political subdivision thereof. It also appears that said section is in violation of the provisions of Section 68 of the Constitution of Alabama of 1901 insofar as it seeks to grant compensation fees or allowances to a public officer after the service has been rendered. In my opinion, therefore, Section 2 of the said act is unconstitutional and void.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Hon. A. M. McConnell,
Judge of Probate,
Limestone County,
Athens, Alabama.

Filing Tax—Schedule 94, General Acts of 1935, page 474.

Deed given by mortgagor to mortgage owner in lieu of mortgage foreclosure with right of redemption reserved for statutory period is not subject to filing tax, provided the original mortgage is filed and lawful filing tax was paid thereon.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"Opinion of the Attorney General dated Jan. 13, 1932, pages 656-657, 1930-1932 opinions, holds that an instrument with right of redemption, executed in lieu of foreclosure, etc., is subject to Mortgage Tax and not Deed Tax.

"Where the original mortgage was filed and Mortgage Filing Tax paid, would the "instrument" when being filed be subject to Mtg. Filing Tax Again?"

I infer from your letter that a mortgagor, to avoid expense incident to the foreclosure of a lawfully recorded mortgage upon which the filing tax had been paid, executed and delivered a deed to the owner of the mortgage, in lieu of mortgage foreclosure, reserving the right of redemption by appropriate provision in the deed. I infer, too, that no consideration passed between the parties to the transaction other than that which would have passed had the owner of the mortgage proceeded to foreclose and to purchase the property at the foreclosure sale. I assume that the grantee did not pay the grantor any money or other valuable consideration for making the deed.

On the above assumption of facts, it is my opinion that no filing tax should be collected on the instrument which is offered for record.

The mortgage itself conveys legal title to the owner of the mortgage. If the mortgage had been foreclosed, a foreclosure deed would not be necessary to vest legal title to the property in the owner of the mortgage who

purchased at the foreclosure sale. Foreclosure of the mortgage does nothing more than cut off the equity of redemption in the mortgagors. The equity of redemption is that right reserved by the mortgagors to pay off the debt and by such payment divest legal title out of the owner of the mortgage. Without the aid of a statute in Alabama, the mortgagors would not, after mortgage foreclosure, have any right to redeem the property. A mortgage foreclosure deed given to the owner of the mortgage who was the purchaser at the mortgage foreclosure sale, performed no office other than to serve as a permanent memorial of the foreclosure sale.

The foregoing principle was enunciated in the case of *Jackson et al. v. Tribble*, 156 Ala. 489, the court saying in part as follows:

"In this case the proof shows that the mortgage was foreclosed by a sale under the power, and that the mortgagee became the purchaser and made a deed to himself. There is no proof, aliunde the recitals in the deed, that the terms described by the mortgage were complied with; but the recitals of the deed show compliance and they are *prima facie* evidence of the facts stated therein, as against the mortgagor. * * * But, suppose there has been no deed executed to the mortgagee, who purchased at the sale; then, according to the common law, the legal title was already in him and without a deed he might maintain ejectment. 2 Jones on Mortgages, paragraph 166."

In the foregoing case, the court further said:

"Furthermore, the sale cuts off the equity of redemption as effectually without as with a deed and left the mortgagor only the statutory right of redemption which might be exercised within two years from the sale. * * * On these considerations the relation of mortgagor and mortgagee, was severed between the parties, and the plaintiff stands, in this suit, not in the attitude of a mortgagee, but of a purchaser after the foreclosure of sale."

Reaffirming the foregoing principle, the court, in the case of *Ritter v. Mosley*, 226 Ala. 653, said as follows:

"Where the mortgagee exercises a power of sale and becomes the purchaser, the authorities all agree that the execution of a deed is not essential to vest legal title, for the simple reason that the mortgagee holds the legal title under the mortgage. *Jackson v. Tribble*, 156 Ala. 480."

It is my opinion that the Legislature of Alabama has not imposed a filing tax for the recordation of an instrument which merely performs the office of memorializing the procedure of foreclosure. This office previously held, in an opinion rendered to the Judge of Probate of Lee County, Opelika, Alabama, Biennial Report of the Attorney General, 1928-1930, page 952, that a deed given in lieu of mortgage foreclosure for a consideration that was nominal, was not subject to a deed filing tax, but conditioned upon the Probate Judge being satisfied that there was no excess in the value of the real estate over the amount of the mortgage, and that the deed was given for the purpose of perfecting the written title. Opinion of the Attorney General, Book 17, p. 74, (Office Edition). Report of the Attorney General, 1926-1928, page 680-682. This office also held in another opinion, that a mortgage foreclosure deed to the mortgagee or his transferee was merely a memorandum of sale and was not subject to a filing tax. Vol. 14, p. 193.

It would be your duty to ascertain if the deed offered for record was given strictly in lieu of mortgage foreclosure with right of redemption reserved for the lawful statutory period of time, and further, if the grantee in the

deed was the owner of the mortgage at the time of the execution and delivery of the deed to him. It would also be your duty to ascertain if any consideration in excess of the mortgage debt existing at the time of the execution and delivery of the deed was paid directly or indirectly, by the grantee to the grantor for the execution and delivery of the deed. If the instrument offered for record failed to contain any recitation that it is given in lieu of mortgage foreclosure with full right of redemption reserved for the statutory period, then in my judgment you would be required under the law to rule that the deed or instrument is subject to the filing tax, for the reason that the transaction amounts to a **sale of the land or property conveyed as distinguished from a mere surrender of the equity of redemption**, as would be the case in the latter instance if the instrument were a mere deed given in lieu of mortgage foreclosure.

It would be your duty as Probate Judge to ascertain the facts and determine whether or not the transaction amounts to a **sale** of the land to the owner of the mortgage, or whether it is nothing more than a **surrender** of the mortgagor's equitable right of redemption which could have been compelled by lawful mortgage foreclosure sale. I emphasize the importance of your determining if the grantee in the deed offered for record was the **owner** of the mortgage at the time of the **execution and delivery** of the deed. Also, you are not bound by a recital in the instrument that it is given in lieu of mortgage foreclosure with right of redemption reserved for the statutory period, but you may look outside of the deed to ascertain as to the truth of these recitals, and such investigation may be made for the purpose of determining whether or not the transaction amounts to a **sale** of the property with the right of repurchase, in which event, it would be your duty to collect a filing tax.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Hon. C. B. Rogers, President,
Alabama Bridge Authority, Inc.,
Montgomery, Alabama.

Alabama Bridge Authority, Inc., an agency of the State of Alabama and not liable for deed tax.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 16th, in which you request my opinion as follows:

"We would like to get your opinion as to whether the deed conveying the Mobile Bay Bridge property to the Alabama Bridge Authority and executed by James A. Crane, Special Master, would be subject to tax.

"The above deed was left with us by Mr. Brooks, Financial Secretary to the Governor, to be recorded, and as the tax on it is rather large, we would not want to pay it if it is not taxable."

The Alabama Bridge Authority, Inc., was formed pursuant to the provisions of the Act of 1935, page 785. Under the provisions of this act, the

President of the State Board of Administration, the State Comptroller and the Chairman of the State Highway Commission were to form a corporation for the purpose of freeing the Alabama highways of toll bridges.

Section 10 of said act expressly provides:

"Any bridge acquired by said corporation by purchase, condemnation or otherwise, shall be forthwith conveyed to the State of Alabama."

In my opinion, the Alabama Bridge Authority, Inc., is an arm and agency of the State of Alabama. **Alabama State Bridge Corporation v. Smith**, 211 Ala. 211, 116 So. 625; **Kansas City Bridge Corp. v. Alabama State Bridge Corp.** 59 F. (2) 48, cert. den. 53 Sup. Ct. 990. As such arm or agency of the state, a deed executed to such Alabama Bridge Authority, Inc., would not require the payment of a deed tax. Quarterly Report of the Attorney General, Vol. II, p. 202.

In answer to your second inquiry, I am of the opinion that the indenture securing the bonds issued by the Alabama Bridge Authority, Inc., would not be subject to the mortgage tax provided by Schedule 94, Section 348, of the Revenue Act of 1935. This entire transaction is a method by which a state agency is carrying out a purpose of the state, that is, the freeing of Cochrane Bridge. The indenture provides in Section 5, at page 37, as follows:

"Section 5. The Bridge Authority will duly record this indenture in every county in the State of Alabama where any part of the bridge is located, and also will make such statements and do such acts now and hereafter as are or shall be required of it to be made or done under any law affecting the recording hereof."

It is further provided in the first paragraph on page 41, that:

"The Trustee shall not be responsible for the recording of this indenture, and shall not be required to file or refile the same as a chattel mortgage, nor shall it be responsible for the recording of any indenture or instrument supplemental to this indenture, nor shall it be required to file or refile the same as a chattel mortgage or otherwise, nor shall the Trustee be under any duty to give notice to anybody of this indenture or any instrument supplemental hereto."

Again, on page 42, the indenture provides as follows:

"The Trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created, and the Bridge Authority agrees to pay such compensation, as well as all expenses necessarily or properly incurred or disbursed by the Trustee hereunder."

Aside from these definite provisions, which would in reality place any tax which would have to be paid on the State, and which therefore, indicates that it was intended that no tax should be paid, I am of the opinion that the entire matter is the carrying out of a governmental purpose, and I am of the opinion that the instrument is not subject to the mortgage tax.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Hon. John Ben Darden,
Tax Assessor,
Chambers County,
LaFayette, Alabama.

Taxation—Ad valorem taxes—limitations as to refunds.

Ad valorem taxes erroneously paid may be recovered if petition for refund is filed within two years from date of payment.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Mr. Leonard Crutchfield of Langdale, Alabama, a blind man, owns a three room house and a small store building assessed at \$370 and a stock of goods and radio assessed at \$130. He has been paying taxes on this property for the past 15 or 20 years.

"When he gave in his property for 1937 taxes I informed him he would be entitled to an exemption of \$2000, which he claimed. The Board of Review allowed him the exemption on his assessment for 1937. He came into my office today and wanted to claim a refund on taxes he had paid previous years on this property. This man has been totally blind for 30 years or longer.

"Please advise me how many years he could claim a refund on."

This situation is covered by Sections 3140 et seq. of the Code of 1923.

Section 3140 provides:

"3140. To refund taxes when paid by error—Any taxpayer who, through any mistake, or by reason of any double assessment, or by any error in the assessment or collection of taxes, or other error, has paid taxes that were not due upon the land of such taxpayer, shall, unless such tax was with the knowledge of the facts voluntarily paid by the taxpayer, be entitled, upon making proof to the satisfaction of the state auditor of such payment, to have such taxes refunded to him. If application shall be made therefor, as hereinafter provided, within two years from the date of such payment."

You will note that the limitation therein provided is two years from the date of payment.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Dr. W. D. Partlow,
Superintendent,
Alabama Insane Hospitals,
Tuscaloosa, Alabama.

Appropriations—Appropriations made to the Board of Trustees of the Alabama Insane Hospitals by Act No. 150, General Acts 1936-37, page 167, approved March 2, 1937, and appropriations made to the Board of Managers of the Partlow State School by Act No. 151, General Acts 1936-37, page 168, approved March 2, 1937, do not lapse and are not repealed if they are not paid or released within the year for which the appropriations are made.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 2, 1937, which reads as follows:

"A question has arisen as to whether certain special appropriations made by the Extra and Special Session of the Legislature 1936-37 may carry over in the event they are not released within the fiscal year for which they were appropriated. Will you be kind enough to refer to Bill No. 150, S. 32—Browder, page 167, and Bill No. 151, S. 33—Browder, page 168, and give me your opinion as Attorney General as to whether or not these appropriations will become ineffective if not released within the year for which they are appropriated?

"I am particularly interested in the installment for 1936-37, as the fiscal year ends September 30th."

I have carefully examined Act No. 150, General Acts 1936-37, page 167, approved March 2, 1937, and Act No. 151, General Acts 1936-37, page 168, approved March 2, 1937, which are the two acts referred to in your letter of inquiry, in connection with Act No. 37, General Acts 1932, page 35, approved September 27, 1932, commonly known as the Fletcher Budget Act, and also in connection with the constitutional amendment which was ratified on August 2, 1933. Sections 1, 2, and 6 of Act No. 150, supra, are as follows:

"Section 1. That there is hereby appropriated out of the Treasury of the State of Alabama, to the Board of Trustees of the Alabama Insane Hospitals, the sum of three hundred fifty thousand dollars (\$350,000) payable in installments as follows: Year 1936-37—one hundred thousand dollars (\$100,000.00). Year 1937-38—one hundred twenty-five thousand dollars (\$125,000.00) and Year 1938-39—one hundred twenty-five thousand dollars (\$125,000.00).

"Section 2. That the amount hereby appropriated is for the purpose of the erection, construction, equipping of and addition to certain buildings on the properties of the Alabama Insane Hospitals. The said Board of Trustees is hereby given the discretion to ascertain and determine the buildings to be erected and additions to be made.

"Section 6. Said appropriation shall be available only when in the opinion of the Governor the condition of the treasury will permit, and shall be paid out only upon the approval of the Governor."

Sections 1, 2, and 6 of Act No. 151, supra, read:

"Section 1. That there is hereby appropriated out of the Treasury of the State of Alabama, to the Board of managers of the Partlow State School the sum of one hundred fifty thousand dollars (\$150,000.00) to be paid in annual installments of fifty thousand dollars (\$50,000.00) for the years 1936-37, 1937-38, and 1938-39.

"Section 2. That the amount hereby appropriated is for the purpose of the erection, construction, equipping of and additions to certain buildings on the properties of The Partlow State School. The said Board of Managers is hereby given the discretion to ascertain and determine the buildings to be erected, and additions to be made."

"Section 6. Said appropriation shall be available only when in the opinion of the Governor the condition of the treasury will permit, and shall be paid out only upon the approval of the Governor."

Section 22 of the Fletcher Budget Act heretofore referred to reads as follows:

"Section 22. Lapsing of appropriations: All unencumbered balances of administration, operation and maintenance appropriations shall revert to the State Treasury at the end of each fiscal year of a given quadrennium and to the credit of the General Fund or special funds from which the appropriation and/or appropriations were made; **appropriations for the purchase of land or the erection of buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made.**" (Emphasis ours).

That part of the constitutional amendment pertinent to your inquiry is hereafter set out:

"At the end of each fiscal year all unpaid appropriations which exceed the amount of money in the state treasury subject to the payment of the same after the proration above provided for, shall thereupon become null and void to the extent of such excess."

It is my opinion that the appropriations to the Alabama Insane Hospitals and to the Partlow State School made by Acts No. 150 and No. 151, supra, respectively, come within the exception contained in Section 22 of the Fletcher Budget Act, supra, and are not affected by the above quoted provisions of the constitutional amendment. The very recent case of **Southern Industrial Institute v. Lee**, 175 So. 365, seems to be direct authority for this view. The situation dealt with in that case was very similar to, though not in all respects like, the situation with which we are now concerned. The appropriation in that case was an appropriation to the Southern Industrial Institute by an act of the 1927 Legislature for the purpose of constructing and equipping buildings at the Institute and the appropriation was made available only upon approval of the Governor and subject to his judgment as to the condition of the treasury. Thus, it may be seen that the only difference between that appropriation and the appropriations here under consideration is that the appropriation to the Southern Industrial Institute was made before the passage of the Fletcher Budget Act, supra, and the constitutional amendment above referred to, while the appropriations here under consideration were made subsequent to that time. However, the principles of law enumerated by the Supreme Court in that case seem to be very clear to the effect that appropriations such as those here under consideration do not lapse or are not repealed either by Section 22 of the Fletcher Budget Act, supra, or the above quoted provision of the constitutional amendment of 1933, if

they are not paid or released within the year for which they are appropriated, even though the acts making such appropriations were passed subsequent to the Budget Act and/or the constitutional amendment. We quote from the decision of the Court of Appeals, written by Mr. Justice Gardner, in the Southern Industrial Institute case, supra, as follows:

"This section (section 22), it is to be observed, provides in part that 'appropriations for the purchase of land or the erection of buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made,' and we think, in any event, this evinces a legislative policy that appropriations of this character should not lapse, but that the work should be completed. * * *

"(6) We have previously referred to the fact that this appropriation is expressly subject to the Governor's approval. * * * And until released by the Governor, it is not a proper claim for presentation to the comptroller, and, therefore, is not such an 'unpaid appropriation' as is referred to in article 23 of the Constitution Amendments (see Gen. Acts 1933, Ex. Sess., p. 196.)"

Therefore, I advise you that the appropriations made by Acts No. 150 and No. 151, supra, to the Alabama Insane Hospitals and to the Partlow State School, respectively, do not lapse and are not repealed if they are not paid or released within the year for which they are appropriated.

Yours very truly,

A. A. CARMICHAEL,
Attorney General,

September 27, 1937.

Hon. Roy Johnson, Tax Assessor,
Jefferson County, Bessemer Div.,
Bessemer, Alabama.

Taxation—Exemptions—Revenue Act of 1935, page 256, No. 194,
Section 2b-(f)—Blind persons.

Real property owned by blind person, not assessed until March 29 of the current tax year, is not exempt from taxes under Section 2b-(f), supra, such exemption being forfeited.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I refer to your inquiry as follows:

"I wish an official opinion concerning the following case:

"A blind man bought a piece of property on lease-sale contract September 23rd and waited until March 29th to assess and claim exemption for the current year. He has waited until all fees and penalties are due. Is it possible to accept this assessment whereby he may be free of taxation? The valuation of his property is less than \$1200.00 including the penalties."

It is my opinion that the question mentioned in your letter, by reason of claimant's delay in returning the property for taxes, has forfeited his right to claim the property exempt from taxation pursuant to Section 2b-(f) Revenue Act of 1935, p. 256, such forfeiture arising out of Section 32, Revenue Act of 1935, p. 256, from which I quote as follows:

"Provided that all property claimed exempt from taxation under the provisions of this act shall be listed with the tax assessor by the tax payer and entered on his return showing the items of property sought to be exempted and provided further that no property omitted from his return shall be exempted."

The property becomes subject to taxation as an escape on or after the third Monday in January. Section 44, Revenue Act of 1935, p. 256. The failure of the property owner to return the property in the manner and within the time required by law invokes a forfeiture as provided by section 32, supra. If the property is not exempt from taxes, then it would not be exempt from the penalties imposed for failure to make the return. ✓

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

September 27, 1937.

Hon. O. S. Nichols,
Tax Assessor, Perry County,
Marion, Alabama.

1. Owner of house and lot occupied by a family as homestead, the assessed value of which is \$1500.00, who subsequently builds an additional house on the same lot, valued at \$1500.00, is entitled to homestead exemption on the first \$2000.00 of the assessed value, since property is impressed with the character of homestead before the second house was built, notwithstanding fact said second house rented to tenant.

2. One owning 160 acres of land, on which is situated a dwelling and several tenant houses, the assessed value of which is \$1680.00, is entitled to homestead exemption on the entire property.

3. One entitled to homestead exemption where property bona fide homestead, notwithstanding the fact that he or she is out of the state visiting or traveling the major portion of the year. The intent to make property permanent home would govern in such cases and the fact person so situated was a widow would make no difference.

Opinion by Assistant Attorney General King.

Dear Sir:

I have your request for opinion, which reads as follows:

"1st. Say Mr. Jones owns his house and lot in Town, and the value on Mr. Jones house and lot is assessed on the tax books for \$3,000 which of course is the 60% value, now in this case we all know that this is his homestead, because he lives in the house, so under the homestead law as passed, Mr. Jones is entitled to exemption for the States part of taxes

"which is $6\frac{1}{2}$ Mills on the value of \$2000, and subject to tax on the remaining \$1,000 value for the State. We of course know that Mr. Jones is subject to the County's part of tax on the entire value of \$3,000.

"2. Say that Mr. Jones owns this same lot above and his lot mentioned is valued at \$500 and his dwelling is valued at \$1000 making his dwelling and lot valued at \$1,500 as the 60% value, and on this same lot we say that he has built a house valued at \$1,500 that he rents, now his entire assessment is \$3,000 as above, but his dwelling and lot is only valued for \$1,500. Now the question before us is, Is Mr. Jones entitled to the full \$2,000 exemption from his total value of \$3,000 or is he under the law just entitled to exemption for the value of his lot and dwelling which shows to be valued at \$1,500 or would he be entitled to exemption of \$2,000 if it took the value of the house rented to allow the full \$2,000 exemption.

"3. Does a taxpayer necessarily have to be living in the house on the property sought to be exempted for his homestead, before he can claim exemption for homestead.

"4. Suppose Mr. Jones owns 160 acres of land for which the law allows 160 acres to be claimed as his homestead, we will say that this land is valued at \$3.00 per acre or \$480 and his dwelling that he lives in is valued at \$600 but there are we will say two tenant houses on this same 160 acres of land valued at \$300 each or \$600 for the two, making the total value of the 160 acres, his dwelling, and tenant houses \$1680, now is Mr. Jones entitled to the full \$1680 value which covers the 160 acres and all three houses, or is he just entitled to exemption on the value of the 160 acres and his dwelling which is \$1,080 and subject to the States tax on the value of the tenant houses.

"5. Suppose Mr. Jones owns 160 acres of land, but we say forty acres that he lives on where his dwelling is does not join or touch the remaining 120 acres, but there is a forty owned by another person that separates Mr. Jones forty from the remaining 120 acres, would Mr. Jones be entitled to exemption on the value of the entire 160 acres as his homestead or just entitled to the value of the forty acres where the house is located, or is he entitled to exemption on 160 acres regardless of whether it touches and joins.

"6. What about property owned jointly, say two brothers own a farm of 160 acres and only one of the brothers lives on the farm, are they entitled to one exemption of the full amount of \$2,000 in the event the property is valued for \$5,000.

"7. Suppose we have an assessment as follows, John Smith Executor for Estate of Tom Smith, for which this is a rather large estate containing several thousand acres of farm lands, and several dwelling houses occupied by the widow, and children of the deceased, there are several married sons that have their homes on the place, as well as the dwelling that their Mother and other children occupy. This property is all owned by Estate of Tom Smith not ever being divided, what amount if they would be exempted for claiming the homestead exemption, you would just allow the \$2,000 full value for homestead I would presume and the remainder of course would be liable for taxes.

"8. Suppose Mr. Jones is a bachelor, never married and never will, but he owns a farm for which he has owned and lived on for 40 years, under the law is he entitled to homestead exemption as well as if he were married and had a family, or is the law going to penalize him.

"9. What about a widow lady that owns her home in town, but most of the time she is out of the County, and out of the State visiting and traveling, but she lives in this house whatever time that she is here during the year, and she gives a young married couple rooms in her house just to have someone there to take care of the property when she is not there. This is her homestead and would be entitled to exemptions as though she was there during the entire year, is that not correct."

My answer to your second question is that the owner of a house and lot occupied by a family as a homestead, the assessed value of which is \$1500.00, who builds an additional house on the same lot, the assessed value being \$1500.00 is entitled to homestead exemption on the first \$2000.00 of the assessed value. Property was impressed with character of a homestead before the second house was built, notwithstanding the fact that said second house is rented to a tenant.

The answer to your fourth inquiry is that a person who owns 160 acres of land, on which is situated a dwelling, where his family resides together, and several tenant houses, occupied by tenants, the assessed value of the 160 acres being \$1680.00, is entitled to his homestead exemption on the entire property, and would likewise be true so long as the assessed value did not exceed \$2000.00.

Answering your ninth question, you are advised that one is entitled to a homestead exemption in property which is his or her bona fide homestead, notwithstanding the fact that he or she is out of the state visiting or traveling, the major part of each year. The intent to make the property the permanent home would govern in such cases, and the fact that the person so situated happens to be a widow would make no difference.

Question 1 propounded in your inquiry has been decided by an opinion of this office dated August 14, 1937 to Mr. W. B. Thrash. This opinion appears on page 49 of the compiled opinions recently sent you. Question 3 is answered by an opinion to Mr. Roy Johnson, dated August 10, 1937, which appears on page 18 of the compiled opinions forwarded to you.

Referring to Question 5, please see the opinion of this office to Mr. T. D. Woodham dated August 10, 1937, appearing on page 22 of the compiled opinions. I refer you to syllabi (b) and (c) thereof. Also see the opinion to Mr. Woodham, syllabus (e) for an answer to Question 6 which you propound. See Syllabus (d), opinion to Mr. Woodham, for an answer to Question 7 and for an answer to Question 8, see syllabus (k) of the same opinion.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 27, 1937.

Hon. Theodore Hurt, Clerk and Register,
Circuit Court of Perry County,
Marion, Alabama.

Justice of the peace does not have final jurisdiction over violations of the Uniform Firearms Act.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of August 16, 1937, which is as follows:

"Please advise me if a Justice of the Peace has final jurisdiction for violations of the Uniform Firearms Act."

Act No. 82, General Acts 1936, page 51, as amended by Act No. 190, General Acts 1936-37, page 223, known as the Uniform Firearms Act, does not confer final jurisdiction upon justices of the peace for violations of said Act. Neither does Section 3847, Code of Alabama, 1923, which deals in general with the final jurisdiction of justice of the peace courts, include violations of the Uniform Firearms Act among the cases specifically mentioned. I am not aware of any other statute which confers such authority on justice courts.

Criminal jurisdiction of justices of the peace and similar officers is wholly the creature of statutes which are strictly construed. Jurisdiction assumed must be conferred clearly by statutes, and will not be extended by inference. 16 C. J. page 154.

Therefore, I am of the opinion that a justice of the peace does not have final jurisdiction over violations of the Uniform Firearms Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

September 27, 1937.

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Schools—Courses of Study—

1. Musical instruments purchased in furtherance of a prescribed course of study may be paid for from general school funds.
2. Under facts submitted, in absence of explanatory circumstances, cost of transportation of teachers to faculty meeting not payable from school funds.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"1. Is there any authority of law that permits the Superintendent of Education to use the School General Fund in purchasing Band instruments, radios, phonographs, pianos, etc?"

"2. If Band instruments, etc., are purchased should not same be paid out of the Bonus Fund or Matriculation Fees? If same is to be paid out of Bonus Fund it would only apply to the period the Bonus Fund Law was in force.

"3. Has the Superintendent of Education authority to pay transportation charges for bringing teachers to a faculty meeting?"

Your first inquiry is answered in the affirmative.

Sections 38 and 431 of the School Code of 1927 provides:

"38. **COURSES OF STUDY.**—The State Board of Education, on the recommendation of the State Superintendent of Education, shall prescribe the minimum contents of courses of study for all public elementary and high schools in this State, and shall fix the maximum number of books which are compulsory in each grade of the elementary schools. In every elementary school in the State there shall be taught at least reading, spelling, handwriting, arithmetic, oral and written English, geography, history of the United States and Alabama, elementary science, hygiene and sanitation, physical training, and such other studies as may be prescribed by the State Board of Education. English shall be the only language employed in teaching in the first six grades of the elementary schools in the State."

"431. **STUDIES REQUIRED TO BE TAUGHT IN ELEMENTARY SCHOOL.**—In every elementary school in the State there shall be taught reading, spelling and writing, arithmetic, oral and written English, geography, history of the United States and Alabama, elementary science, hygiene and sanitation, physical training and such other studies as may be prescribed by the State Board of Education. English shall be the only language employed in teaching in the first six grades of the elementary schools in the State."

This office has made inquiry at the State Department of Education as to whether music has been prescribed as a course of study and has been advised that it has been so prescribed for the public schools of this State.

Section 118 of the School Code of 1927 provides:

"118. **COURSES OF STUDY.**—The County Board of Education shall prescribe, on the written recommendation of the County Superintendent of Education, courses of study for the schools under its jurisdiction, and a printed copy of these courses of study shall be supplied to every teacher and to every interested citizen of the County."

If the musical instruments enumerated in your first inquiry have been purchased in furtherance of an approved course of study, the expenditures made from general school funds in payment thereof, are proper. Cf. Quarterly Report of the Attorney General, Vol. VI, page 85.

In view of the above conclusion, consideration of your second inquiry is unnecessary.

In the absence of a detailed statement of the facts, we are unable to answer your third inquiry.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

September 27, 1937.

Hon. G. H. Boyd,
 Register, Jefferson County,
 Birmingham, Alabama.
 Attention Hon. C. M. Hewitt, Deputy Register.

Section 7283—Register entitled to fee for preparing transcript of record for appeal to the Supreme Court, of fifteen cents for each 100 words of transcript, and five cents for each 100 words of additional copy other than the copy for the appellee.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 2, 1937, in which you request my opinion as follows:

"Will you please advise me as to the legal and proper charge allowed Registers of the Circuit Court for preparation of transcripts in case of appeal to the Supreme Court.

"I am familiar with the case of Middleton v. General Waterworks and Electric Corporation, 149 So. 352, and with your opinion rendered at the instance of the Honorable Henry J. Garrett, Clerk, Circuit Court of Hale County, found in Quarterly Report of the Attorney General for the period from October 1, 1936 through December 31, 1936. It seems that the above authority should be determinative of the question as to Equity Court, but one of the following considerations may lead to a different conclusion:

"Section 7278, which is controlling as to cases from the Law Division, was enacted on September 30, 1919.

"Section 3718 of the Code of 1907, enumerating the fees allowed the Registers, does not include the items relating to records for the Supreme Court. However, the Code of 1923 does include these items. I have searched the General Acts of 1909, 1911, 1915, 1919, 1920, 1921 and 1923 and find no enactment of an amendment to Section 3718 as to include these items. Neither the Code of 1923 nor Michie's Code of 1928 indicate that Section 7283 was revised by the Code Committee.

"If it be a fact that Section 7283 was enacted after Section 6102,—then I believe that the following matter is worthy of consideration:

"Under Section 7278, the pertinent sub-divisions relating to records for the Supreme Court as for cases from the Law Division are as follows:

"Record for Supreme Court, for each 100 words.....	15c
"Each additional copy thereof, for each 100 words.....	05c

"While under Section 7283, providing for the fees for Registers for such service, the wording is:

"Record for Supreme Court, for each 100 words <u>when not otherwise provided for herein</u>	15c
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"For each additional copy of any record for Supreme Court, for each 100 words	05c
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"The question is presented as to whether the underlined expression, as shown above, refers to the entire Code and hence to Section 6102, or whether it refers simply to Section 7283, or to the particular article in which same is included.

"May I invite your attention to the fact that Section 6108, providing for the office copy of transcripts and fixing the fee for same, refers only to Clerks of court and not to Register. Due to this, I would appreciate your opinion as to the proper charge, if any, for the office transcript in case of appeal."

Section 6102 as revised by the Code Committee provides that the Clerk or Register "shall in making the transcript make a copy thereof for the appellee and deliver it to him or his attorney and for the transcript he shall have 10c for each 100 words and for the copy 5c for each 100 words, both of which shall be taxed as costs against the unsuccessful party in the appeal. The appellant shall be entitled to procure a copy of said transcript by paying therefor at the rate of 5c for each 100 words; provided the appellant make request of the clerk, register, or judge of probate before the preparation of the original transcript."

Under Section 6108 of the Code, Acts of 1915, page 336, the clerks of all courts are required to make and keep on file in their office an exact copy of the record for which such clerks are permitted to charge, to be taxed as costs of appeals in such cases the sum of two dollars and fifty cents for such copy of the record. This Section does not expressly apply to Registers.

Under Section 7283, listing the fees for Registers, it is provided:

"Record for supreme court, for each one hundred words, when not otherwise provided for herein15c

"For each additional copy of any record for the supreme court, for each one hundred words05c"

These statutes should be construed so as to avoid any conflict if possible and so as to leave room for operation of each section. You will note that the last paragraph of Section 7278 construed by the Court of Appeals and Supreme Court in the case of Middleton v. General Waterworks and Electric Corporation, 149 So. 351, 352, provides for fees for the record for the Supreme Court and "each additional copy thereof." Under Section 7283, no provision is made for each additional copy of the record to the Supreme Court, only "for each additional copy of any record for the Supreme Court." The other provisions of Section 7283 as to the record for the Supreme Court are slightly different from the similar provisions of Code Section 7278. In my opinion, therefore, the decision in the Middleton case is not applicable to the situation set out in your letter. Construing all of the Acts, my conclusion is that both Code Sections 6102 and 7283 allow to the Register a fee of fifteen cents per 100 words for preparing the transcript for the Supreme Court, which includes a copy for the appellee, as expressly required by Section 6102. The last paragraph of Section 7283, "for each additional copy of any record for the Supreme Court, each 100 words five cents," in my opinion applies to other additional copies than those for the appellee. By such construction, any apparent conflicts between Code Section 6102 and Code Section 7283 are avoided.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Hon. W. P. Russell,
Custodian County School Funds,
Lowndes County,
Hayneville, Alabama.

County Superintendent of Education—

Office not vacated by illness—May be removed if illness is of such extent as to constitute incompetence.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 13, 1937, in which you request my opinion as follows:

"Mr. J. A. Coleman, Lowndes County Superintendent of Education has been out of his office for several months on account of serious illness and it is very probable that he will be unable to resume his duties.

"At the present time Mr. Coleman's daughter is acting Superintendent of Education.

"Being in charge of county school funds and under bond for the proper distribution of such funds, I feel that it is necessary to have an opinion from you as to who has the authority to act as Superintendent of Education under the circumstances."

In an opinion of this office reported in Quarterly Report, volume 6, page 5, there was considered the effect of the illness of an officer. It was there held that the fact that during a part of the term the officer was absent by reason of illness would not of itself vacate his office. That opinion is extended to include the office of the county superintendent of education inquired about, and I advise you that in my opinion the mere absence on account of illness does not vacate the office of county superintendent of education. Such county superintendent can be removed only by impeachment. **Petree v. McMurray**, 210 Ala. 639, 98 So. 782.

In that same opinion there was considered the question of whether the illness would constitute such an incompetency as would subject the official to removal for cause under Section 4497 of the Code. I quote from that opinion:

"Whether or not his illness and physical condition would constitute such an incompetency as would subject him to removal for cause under Section 4497 of the Code would in large measure depend upon the particular facts. In this connection I call your attention to the following quotation from the case of *State Ex Rel Attorney General v. Martin*, 180 Ala. 459, at page 467, wherein the Court, quoting from *State Ex rel, etc. v. Lowe*, decided at the same session, said:

"It is possible that incompetency of an official may exist by reason of either physical or mental conditions, and that it may bring detriment to the public whenever from any cause it may occur. But the law must be interpreted so as to allow it to operate reasonably, and such interpretation excludes from the term "incompetency" all such mere temporary incapacity as ordinarily attends and is co-terminus with acute disease. The incompetency which serves for impeachment is such as characterizes

" 'the usual status of the officer and which will therefore be continuous in some degree.'

"The Court then laid down the further condition and limitation that the duration of the incompetency contemplated by law must be such as to indicate beyond a reasonable doubt that it will continue during the remainder of the term of the accused officer."

In the event the office of county superintendent of education has been properly vacated, the vacancy must be filled by the County Board of Education under the provisions of Section 14(a) of the School Code of 1927. As it appears that no steps have been taken to remove the superintendent from office, it is my opinion and I advise you that J. A. Coleman, the incumbent, is still the county superintendent of education of Lowndes County and that no one else has authority to act as such superintendent of education until the office is vacated and properly filled pursuant to the statutes above cited.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Hon. Fred H. McDuff,
Sheriff, Jefferson County,
Birmingham, Alabama.

1. Sheriff may use reasonable force in evicting tenants under order of restoration, pursuant to judgment in suit of unlawful detainer.

2. If necessary, sheriff may break an outer door to a dwelling house in carrying out the order of the court to restore the plaintiff in a suit of unlawful detainer to possession of the premises.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Please advise me whether or not the Sheriff has power, authority and duty to break an outer door to a dwelling house for the purpose of evicting the tenants where a judgment has been rendered in Inferior Court in favor of the landlord for possession of the premises in a suit of unlawful detainer."

Section 8010 of the Code of Alabama of 1923 provides:

"8010. If plaintiff succeeds, writ of restitution issued; costs.—If the justice determines in favor of the plaintiff, he must record the decision, and render judgment with costs, upon which he must issue a writ of execution, commanding the sheriff to restore the plaintiff to the possession or place him in possession of his lands and tenements according to complaint, and to levy on and sell a sufficiency of the defendant's goods and chattels, lands and tenements, to satisfy the costs of the proceedings. Successive writs may issue at any time when necessary to eject defendant or collect costs and damages, and a defendant who re-

"fuses to obey the mandate of the writ as to the possession of the property, or who enters upon the premises without just cause or legal excuse after being ejected, shall be guilty of resisting officer and contempt of court, and shall be punished and fined accordingly, in the discretion of the court issuing the process."

While the writ is described in this statute as a writ of execution, in the syllabus to the statute it is described as "a writ of restitution". It is not an ordinary writ of execution commanding the sheriff to levy on goods, but contains also an order to the sheriff "to restore the plaintiff to the possession or place him in possession of his lands and tenements according to complaint." In the case of *Lankford v. Green*, 62 Ala. 314 @ 319 the Supreme Court considered the effect of such a writ and the proper execution thereof. The Supreme Court there said:

"In the execution of a writ of possession, it is the duty of the sheriff to place the plaintiff in the actual and peaceable possession of the premises recovered. **If the tenant in possession does not yield peaceably and quietly, he must be removed, and until he is removed, the writ is not executed.** 2 Tidd's Pr. 1246-7; Freeman on Executions Sec. 474; *Farnsworth v. Fowler*, 1 Swan 1, 55 Am. Dec. 718."

While the general rule is that a sheriff may not break into a dwelling while executing civil process, this process, as you will see, is different from the ordinary civil process in that the sheriff is under the duty to remove the tenant, and until the tenant is removed the writ is not executed.

This exact question was presented to the Supreme Court of Connecticut in the case of *Fry v. Taylor*, 106 Conn. 387, 108 Atl. 138. In that case the court had rendered a judgment in favor of the landlord and pursuant to the judgment had issued a writ requiring the sheriff to dispossess the tenant. In order to dispossess the tenant it was necessary for the sheriff to force open a locked door. The court held that the tenant, in seeking to maintain possession in defiance of the court's judgment, was himself a wrongdoer and that since the sheriff used no more force than was reasonably necessary, the sheriff was not liable on damages and forcing entry into the dwelling.

It is therefore my opinion that where a judgment has been rendered by a proper court in a suit of unlawful detainer and a writ has been issued commanding the sheriff to restore the plaintiff to possession, that the sheriff may use such reasonable force as is necessary to remove the tenant. If the tenant refuses to grant admission to the sheriff but seeks to maintain possession in defiance of the court's judgment and by locking the doors to such dwelling house, in my opinion you have the power and authority to force an entrance, using no more force than is reasonably necessary.

Yours very truly,

A. A. CARMICHAEL,
Attorney General,

September 27, 1937.

Hon. M. H. Hurt,
Register,
Macon County,
Tuskegee, Alabama.

Offices and Officers—

1. County Engineer and Supervisor of Roads and Bridges, appointed under Local Acts of 1935, page 41, applicable to Macon County, hold an office of profit.
2. Register of Circuit Court in Equity an office of profit and cannot hold office of County Engineer or Supervisor of Roads and Bridges.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 2, 1937, in which you request my opinion as follows:

"Do any of the different officers or employees enumerated in Sec. 4, Local Acts No. 104, H-239- Bridges, page 41, Local Acts, 1935, hold an office of profit within the contemplation of Section 280 Constitution of 1901?

"Can the Register of the Circuit Court in Equity at the same time serve as any one of these different officers or employees? (Opinion of Atty. General, Dec. 31, 1934)."

Under Section 4 of the Local Act applicable to Macon County (Local Acts 1935, page 41), the Board of Revenue is given the power and authority to employ "an engineer and a supervisor or supervisors for the roads and bridges of said county if necessary." These are the only officers or employees enumerated in said Section 4 and I assume that they are the officers or employees inquired about in your letter.

In my opinion, the engineer and supervisor for the roads and bridges of said county, appointed pursuant to said Local Act, hold an office of profit under Macon County within the contemplation of Section 280 of the Constitution of 1901. Compare **Ward v. State**, 82 So. 660, 662.

Answering your second question, it has previously been ruled that the office of Register in Chancery is an office of profit within the meaning of this Act. Quarterly Report, Volume 1, page 85. In my opinion, therefore, the Register of the Circuit Court in Equity cannot serve as county engineer or road supervisor without violating Section 280 of the Constitution of 1901.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Hon. N. P. Tompkins,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama

Filing Tax—Deed Tax.

(a) Deed tax on property located partly in the State of Alabama, and partly in another state, to be determined by the State Tax Commission upon petition and hearing of evidence.

(b) Proponent of deed for record has privilege of paying entire deed tax on the entire amount recited as the true valuation of the property or upon the amount found to be the true valuation of the property by the Probate Judge and of filing petition for a determination of the value of the property located in Alabama, by the State Tax Commission within thirty days after offering said instrument for record.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"I have a request to file for record a deed expressing consideration of \$150,000.00 which conveys real estate in Colbert County, Alabama and real estate in the state of Mississippi, the total consideration for the property conveyed in both states being \$150,000.00. Should I charge a deed filing tax on the entire valuation of \$150,000.00 or only on that part in the State of Alabama?"

In reply I wish to advise you that it is my opinion that the filing tax is due upon the value of that portion of the realty which is located in the State of Alabama as set out in your statement of facts.

The person offering the deed for record has a two-fold option, provided for in the Revenue laws of 1935, Schedule 94, subsection (h) of Section 348, Article XIII, Chapter I, as follows:

"Sub-section (h). If any part of the property embraced or described in any instrument which is required under this section to pay a record privilege tax is located without this State, the indebtedness upon which the tax shall be paid for the privilege of recording such instrument shall be that proportion of the indebtedness secured by the instrument which the value of the property located in this State bears to the whole property described in said instrument. The State Tax Commission may ascertain the value of the whole property, and of that part of it which is located within this State, for the purpose of ascertaining the amount of the indebtedness upon which said tax shall be paid. And the value of that part of the property located within this State and the amount of the indebtedness upon which such tax shall be paid shall be ascertained in the following manner; First, the owner of any such instrument, or his agent, or attorney, may petition the State Tax Commission to ascertain the value of the whole property, and of that part of which is located within this State and the amount of the indebtedness upon which such tax shall be paid, and the State Tax Commission after hearing such evidence as may be offered or as may be before it; shall fix and determine the value of that part of the property located within this State and the

"amount of the indebtedness upon which the tax shall be paid and shall endorse its findings on such instrument and upon the presentation of said instrument, with such endorsements, to the Probate Judge of the County in which any part of the property is located, such instrument upon the payment of the tax upon the amount of such indebtedness as so ascertained by said State Tax Commission and of the recording fees of the Probate Judge; or, second, the owner of any such instrument, or his agent, or attorney, may have such instrument recorded by paying to the Probate Judge of the county in which the instrument is offered for record, the privilege tax in the entire amount of the indebtedness secured by such instrument, and may thereupon present his petition to the State Tax Commission within thirty days after such instrument is recorded, and it shall be the duty of said property and of that part of it located within this State, and to fix and determine the amount of the indebtedness upon which the tax shall be paid, and said Commission shall thereupon ascertain such valuation and fix and determine such indebtedness, and shall order the Judge of Probate to refund the excess of privilege tax collected by him and the Probate Judge shall comply with such order; and the tax paid upon the entire amount of such indebtedness shall be held by the Probate Judge until the State Tax Commission determines the amount of the indebtedness upon which such tax shall be paid."

You will note that I have set forth the provisions of the Revenue Act of 1935, Schedule 94, sub-section (h) of Section 348, Article 13, Chapter 1. You will further note that the second alternative provided by this Act is not entirely clear in its provisions. I call your particular attention to that part of it beginning, "and it shall be the duty of said property and of that part of it located within this State." Unless the entire Act is read this particular provision in the Acts of 1935 above quoted makes no sense whatsoever. In my judgment, however, it is necessary to read the entire Act in order to get the intention of the Legislature. The Supreme Court of Alabama and the Appellate Court of Alabama have held numerous times that the intention of the Legislature constitutes the law. I wish to refer you to the case of **Birmingham v. Southern Express Co.**, 164 Ala. 529, in which the court held "the intention of the lawmakers is the law." It is necessary to read the entire act in order to gather the intention of the Legislature and thereby determine what the law really is. **State ex rel City of Mobile v. Board of Revenue and Road Commissioners**, 80 So. 368, 202 Ala. 303, 59 C. J. p. 601, paragraph 160.

It has been held that a statute will not be held unconstitutional or void because of mere omission of details necessary to accomplish its evident purpose, if such details can be supplied by reasonable implication. **State ex rel Otto v. Kansas City**, 276 S. W. 389, 397, 310 Mo. 542. The fact that an act or a statute is in such form as to present difficulty in ascertaining its meaning will not within itself render the act or statute nugatory. 59 C. J., p. 607; **Pacific Coast Dairy v. San Francisco Police Court**, 298 Pac. 164; **Adams v. Green**, 206 S. W. 759, 182 Ky. 504; **Katzman v. Com.**, 130 S. W. 990, 140 Ky. 124, 140, Am. State Report 359, 30 L. R. A. (ns) 519.

The premises considered, it is my opinion that the entire act must be read and construed as a whole in order to properly ascertain the real meaning of the Legislature in this particular statute and, therefore, ascertain what the law really is on this particular subject. Upon such examination of the entire statute, the conclusions are inevitable that two alternatives are offered the taxpayer by this statute, viz., that the owner of any such instrument, or his agent or attorney, may petition the State Tax Commission to ascertain the value of the whole property, and of that part of it located

within this State, and the amount of the indebtedness upon which such tax shall be paid and the State Tax Commission after hearing such evidence as may be before it; shall fix and determine the value of that part of the property located within this State, the amount of the indebtedness upon which tax shall be paid and shall endorse its findings on such instrument and upon the presentation of said instrument with such endorsement to the Probate Judge of the county in which any part of the property is located, such instrument, upon the payment of the tax upon the amount of such indebtedness as so ascertained by the said State Tax Commission and of the recording fees of the Judge of Probate, shall be recorded.

Secondly, the owner of any such instrument or his agent or attorney may have such instrument recorded by paying to the Probate Judge of the county in which the instrument is offered for record the privilege tax on the entire amount of the indebtedness secured by such instrument, and may thereupon present his petition to the states Tax Commission within thirty days after such instrument is recorded and it shall be the duty of the said State Tax Commission to determine the value of the said property or that part of it located within this State and to fix and determine the amount of the indebtedness upon which the tax shall be paid and shall order the Judge of Probate to refund the excess of privilege tax collected by him and the Probate Judge shall comply with such order; and the tax paid upon the entire amount of such indebtedness shall be paid by the Probate Judge until the State Tax Commission determines the amount of the indebtedness upon which such tax shall be paid.

I have examined the above quoted law through the journals of the House and the Senate and it is my judgment that the conclusions announced in this opinion are correct interpretations of the intention of the legislature and the law on this subject.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

September 27, 1937.

Hon. Howard G. King,
Assistant Director,
Transportation Bureau,
Alabama Public Service Commission,
Montgomery, Alabama

Contract Carrier—Motor Vehicle Act of 1932 (Acts Extra Session 1932, page 178).

1. Person, not regularly engaged in the transportation business but occasionally transporting property of others for hire, not a contract carrier as defined by such act.
2. Person transporting only property offered for sale, sold or to be sold by him, not a contract carrier as defined by said act.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 11, 1937, in which you request my opinion as follows:

1. A party operates a cotton gin and owns a truck for his own use, 28 miles from the railroad and on a dirt road. Is he required to buy a carrier license to haul cotton to town for his customers when he has room for it?

2. The Security Warehouse Company of LaGrange, Georgia, owns a cotton warehouse and a cotton gin both of which serve the farms direct, handling the farmers' cotton. They also own trucks that are not for hire, but haul their own cotton and the cotton of their customers. They wish to serve their customers who live across the line in Alabama and wish to be advised as to the Alabama law applicable, and particularly as follows:

(a) A party owning a cotton gin and owning trucks wants to haul seed cotton from an Alabama farm to a Georgia cotton gin, the charge for hauling being added into the cost of ginning.

(b) A party owning a cotton warehouse and owning trucks wants to haul baled cotton from an Alabama farm, across the line to a Georgia warehouse, to market the cotton and charge for the hauling in connection with the warehouse charges, but does not haul for the public.

(c) A party owning a truck in Georgia, having complied with all Georgia laws to haul cotton from farm to market, but not for hire in commerce, wants to haul seed cotton from Alabama farm to Georgia gin and charge for hauling.

Your first inquiry involves the liability for a carrier's license of one operating a cotton gin, owning a truck for his own use but hauling cotton for his customers when it is convenient to do so. Under the Contract Carrier Act of 1932, Acts of Extra Session, 1932, page 178, Section 1(d), 3 and 4, it is provided:

"Contract carrier shall not be construed to mean or include (3) any person, firm, association or corporation who does not regularly engage in the transportation business but occasionally transports persons or the property of others for hire, or (4) any person, firm, association or corporation, when transporting only property offered for sale, sold or to be sold by him."

It appears from the facts set out in your inquiry that the person in question does not regularly engage in the business of furnishing transportation of persons or property for hire, but at most only occasionally transports the property of another. It also appears that probably this person would come under the exception set out in sub-section 4 cited above. In my opinion, therefore, such party is not required to buy a carrier's license.

2. Your second inquiry involves a resident of Georgia. I assume that your inquiry is only as to the construction of the Carrier Acts and you do not request information as to the regular motor vehicle licenses necessary. For your information, however, I call your attention to Schedule 158.15 of the Revenue Law of 1935, as amended by Acts of 1936, page 208, which regulates the motor vehicle license on non-residents used for commercial purposes. I call your attention to the opinion of this office under date of August 21, 1937, to Hon. Henry S. Long, construing this section.

I now proceed to consider the particular facts set out in your letter and whether under such facts the person in question is liable for mileage as a contract or common carrier.

(a) If such person does not regularly engage in the transportation business but merely transports property for hire occasionally, he would not be a

contract or common carrier under the Motor Carrier Act of 1932. If such party regularly engages in the transportation business there would arise the further question of whether such party comes within the exception of section 1(d)—4. If the seed cotton transported is property offered for sale, sold or to be sold by the party owning the cotton gin, it would come within this exception and the person in question would not be a contract carrier, as defined by the act. If, on the other hand, such person regularly engages in the transportation of seed cotton for hire, which such cotton is not property offered for sale, sold or to be sold by him, in my opinion he would be a contract carrier and subject to all the provisions of the said act.

(b) Your next inquiry is as to the liability of a party owning a cotton warehouse who hauls baled cotton from an Alabama farm to a Georgia warehouse to market the cotton, charging for such hauling in connection with the warehouse charges. It appears from the facts set out that such person transports only property offered for sale, sold or to be sold by him, and, therefore, is not liable as a contract carrier.

(c) Your next inquiry is as to a party owning a truck in Georgia and desiring to haul seed cotton from Alabama farm to Georgia gin and charge for such hauling. The mere fact that such hauling is of seed cotton and that the only article transported is seed cotton does not constitute any exception to the definition of a contract or common carrier under the Motor Vehicle Act of 1932 above cited. If such party intends to engage regularly in the transportation business, transporting seed cotton for hire, he would be a contract carrier as defined by such Motor Vehicle Act and would be under all the duties as to permits, licenses and mileage tax, provided by said act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Hon. Simon Wampold,
Chief Clerk, Probate Court,
Montgomery County,
Montgomery, Alabama.

License—Motor Vehicles—Automobile designed for transporting freight and merchandise requires truck license tag. Automobile not designed for carrying freight or merchandise not liable for truck license.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 14, 1937, in which you request my opinion as follows:

"The License Inspector of this County has brought up a matter that we would like cleared before October 1. Cleaning concerns take automobile coaches and sedans and simply paint the rear side windows with a business sign, making no other changes in the car whatsoever, leaving the upholstery just as it is, and use these automobiles for purpose of collecting and delivering clothes for cleaning.

"It is the contention of the License Inspector that since the cars are used in this manner, they should have a truck tag instead of a regular automobile tag. This office has been selling private tags for these cars, as they are nothing more or less than private passenger cars, with the exception of the painted signs on the side windows, and of course, are used primarily for business.

"Will you be kind enough to clear this matter up promptly, as we begin selling automobile tags on October 1?"

In an opinion of this office reported in Quarterly Report 4, page 173, it was decided that a "sedan delivery" that is, a passenger automobile carrying a removable rear seat and equipment with a back door required a truck license. A motor truck is defined by Schedule 158(j) of the General Revenue Law of 1935 as:

"(j) 'Motor Truck': Any motor-propelled vehicle **designed for carrying freight or merchandise** or drawing a semi-trailer truck on not more than two axles and not operated or driven on fixed rails or tracks; but it shall not include self propelled vehicles equipped primarily for passenger transportation."

It would be a question of fact in each case as to whether the vehicle in question was designed for carrying freight or merchandise. If the automobile coach or sedan was so changed as to be designed for carrying freight or merchandise, in my opinion, it would require a truck license tag. If, however, such automobile coach or sedan is merely changed by painting the rear side windows with a business sign and nothing more, this would not, in my opinion, bring such automobile coach or sedan under the definition of a motor truck as one designed for carrying freight or merchandise. If, therefore, such automobile coach or sedan is not so changed as to be designed for carrying freight or merchandise, it would not come within the definition of a motor truck, and, therefore, would not require a truck license tag.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

September 28, 1937.

Barber Commission of Jefferson County,
Jefferson County Courthouse,
Birmingham, Alabama.

Veteran's Exemption—Employer, Employee—Shine boy and lady manicurist to whom no compensation is paid, who practice their separate vocations within the barber shop, held not an employee within the meaning of the Veterans Exemption Act (General Acts of 1935, page 1057).

2. Unemployment Compensation—Shine boy and lady manicurist who practice their vocations in barber shop but render no services to the barber in return for the privilege of so practicing, held not an employee within the meaning of the Unemployment Compensation Law (Acts of 1935, page 950).

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"We have had several inquiries at this office as to who is exempt and who is not exempt from paying occupational license under the Disabled Veterans' Act, and we would like to know if a shine boy in a barber shop would be considered an employee where he receives no salary from the owner of the shop, but simply has the privilege of working in said shop, retaining all the money received by him for shines and tips.

"Under the Veterans' Act an employer is entitled to one employee. Would a negro shine boy be considered as a second employee?

"And does the same apply to a lady manicurist, who does not receive any salary from the owner of the shop, but retains all she takes in for her work and tips?

"We are anxious to get the above information so that we can answer these inquiries intelligently. We would also like to know if the manicurist and shine boy come under the provisions of the Unemployment Compensation Act. Neither of them receives any salary, but are in fact working for themselves."

Your first inquiry involves the construction of Section 5 of the Veterans Exemption Act (Acts of 1935, page 1057), which provides as follows:

"Section 5. Any person who assists or serves such veteran in the conduct or carrying on of such veteran's business or occupation shall be deemed an employee, helper or apprentice, whether such assisting person be paid any compensation for his assistance or services or not. The term 'license tax' as used in this act shall be deemed to include any tax prescribed by a license tax schedule but not to exclude any license tax otherwise prescribed."

Under the provisions of this act, the term "employee" includes any person who assists or serves the veterans in the conduct or carrying on of the veteran's business or occupation. Under your first inquiry, the question arises as to whether a boy who shines shoes "assists or serves such veteran in the conduct or carrying on of such veterans' business or occupation", as a barber. The same question arises concerning the lady manicurist who practices her vocation in the barber's shop with the permission and approval of the barber veteran, who does not receive any salary from the owner of the shop but retains all she takes in for her work and tips.

Under the definition of employee in Section 5 of the Veterans Exemption Act, supra, the fact that compensation is not paid by the veteran is not determinative of the relationship of employer and employee. However, this fact, together with all of the facts as to the relationship between the shine boy and manicurist and the owner of the barber shop, are proper to be considered in determining whether or not such shine boy and manicurist "assist or serve such veteran in the conduct or carrying on of such veteran's business or occupation." In my opinion, the shine boy and manicurist are independent contractors engaged in performing service for their own benefit. Any services rendered in connection with the performance of the barber shop are merely incidental to the performance of their own service for their own benefit. The veteran's business or occupation is that of a barber, that is, to give shaves and hair cuts. It is from this occupation that he receives his income, and from the facts set out in your letter, he receives no income for

the shines and manicures. Therefore, in my opinion, the shine boy and manicurist do not "assist or serve the veteran in the conduct or carrying on of the veteran's business or occupation." It follows, therefore, that the manicurist and shine boy are not employees of the veteran within the meaning of the act above quoted.

2. Coming to a consideration of the liability of the barber for contributions for the manicurist and shine boy under the Unemployment Compensation Law of Alabama, we are presented with an entirely different question. The terms "employee" and "employment" are defined by the Alabama Unemployment Compensation Law (Acts of 1935, page 952, Section 2, subsection (g)) as follows.

"(g) 'Employment' means any employment in which all or the greater part of the person's work (within the continental United States) is or was customarily performed within this State, under any contract of hire, oral or written, express or implied, whether such person was hired and paid directly by the employer or through any other person employed by the employer, provided the employer had actual or constructive knowledge of such contract. Such employment shall include the person's entire employment (in all states, including the District of Columbia). In the case of all other persons employed partly in this State and partly in other states, the commission is authorized, with the approval of the Governor, to enter into reciprocal arrangements with other states as to the extent the employment of such persons shall be included under this definition. * * *"

Under this definition it must be determined whether the shine boy and lady manicurist inquired about perform any services under a "contract of hire, oral or written, expressed or implied." In order to answer this question it is necessary to consider the facts as set out in your letter. In your request you say that the shine boy is paid no compensation in the form of money, but is granted the privilege of shining shoes in the barber shop. Second, the barber supplies nothing necessary to the vocation of shining of shoes except a place in which to work—the barber shop itself. The question also arises (3), does the shine boy perform any services for the barber of any kind or nature in which the barber exercises complete control over the manner of the said work. In the case of *Birmingham Post v. Sturgeon*, 227 Ala. 162, 149 So. 74, the Supreme Court of Alabama said:

"It is not possible to lay down a hard and fast rule or state definite facts by which the status of men working and contracting together can be definitely defined in all cases as employee or independent contractor. Each case must depend on its own facts. Ordinarily, no one feature of the relation is determinative, but all must be considered together."

"This court has had occasion frequently to point out the distinguishing characteristics between the relation of an independent contractor and that of a servant. A clear and concise statement of such distinction is made in our case of *Republic I. & S. Co. v. McLaughlin*, 200 Ala. 204, 75 So. 962, to the following effect: The relations is "determined by whether or not the person for whom he is working 'has control over the means and agencies' by which the work is done (citing cases), (and) or has control over the means and agencies 'by which the result is produced' (*Harris v. McNamara*, 97 Ala. 181, 12 So. 103). In line with this test is the rule that he is deemed the master who has the supreme choice, control, and direction of the servants and whose will the servant represents, 'not merely in the ultimate result of his work, but in all its details' (*Lookout Mt. I. v. Lea*, 144 Ala. 169, 39 So. 1017)." For the person

"to be a servant the other party must retain "The right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done" (39 C. J. 35), as he has "a reserved control or direction of the work" (Alabama Power Co. v. Bodine, 213 Ala. 627, 105 So. 869). "Giving orders is the role of the Master." Alabama Power Co. v. Bodine supra."

"In the case of Martin v. Republic Steel Co., 146 So. 276, the court held that the criterion is not whether the owner did in fact exercise supervision, but rather did he have the right to do so; did he possess the power to control."

"(See also General Refrigeration Sales Co. v. Taylor, 158 So. 314)."

In my opinion, the barber does not retain supervision or complete control over the manner and detail of the work of either the shine boy or the manicurist. From the facts set out in your letter it is apparent that these parties supply their own supplies; they are paid no compensation by the barber himself; they do not account to the barber for any money received. From your statement of facts, it seems that these parties perform their service for the general public as well as the patrons of the barber shop, and that the barber exercises no control whatsoever over the services rendered by them. It seems that the shine boy and the lady manicurist are given the privilege of practicing their vocations within the barber shop under no contract of hire, express or implied, since nothing is paid to them either in the form of cash or in any other form, as defined by Section 2, sub-section (c) of the Unemployment Compensation Law. It is, therefore, my opinion that under the Alabama Unemployment Compensation Law, neither the shine boy nor the lady manicurist is an employee of the barber within the meaning of the Alabama Unemployment Compensation Act, but that such parties are independent contractors, operating a business for themselves over which the barber has no control. I refer you to an opinion of this office to Hon. J. L. Kaufman, Chairman, Unemployment Compensation Commission, under date of February 17, 1936, which held that an independent contractor does not come within the definition of employment, as set out in the Unemployment Compensation Law, quoted supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

September 28, 1937.

Hon. J. A. Simpson,
State Senator,
831 First National Bank Building,
Birmingham, Alabama.

Licenses—Automobile Dealers—

Counties can collect fifty per cent of license levied for the benefit of State under Act of the Special Session of 1936-1937, page 186, which amends Schedule 12 of Section 348 of Revenue Acts of 1935.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 3, 1937, in which you request my opinion as follows:

"The Automobile Dealers Association of Alabama by Mr. C. E. Anderson, its Secretary, has asked me to inquire of you whether or not counties can collect fifty percent of the licenses levied for the benefit of the State on Automobile Dealers under Schedule 12 of Section 348 of the General Revenue Law of 1935, as amended by House Bill 46 by Mr. Poole, approved March 2nd, 1937, and found at page 186 of the Acts of the Special Session of 1936-37.

"Your opinion and ruling on this matter in advance of the date for payment of these licenses would doubtless save a great deal of confusion and uncertainty and will be very greatly appreciated by the writer, the Association and all concerned."

Schedule 12 of Section 348 of the General Revenue Law of 1935, prior to the amendment referred to in your letter, was considered by this office in an opinion reported in Quarterly Reports, Volume I, page 26. It was there held that under said Schedule an automobile dealer is liable for both State and County license in each county in which he maintains an established place of business. I quote from that opinion:

"By subsection (b) of Section 360, it is provided:

" 'There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm or corporation engaged in or who shall carry on any of the occupations, businesses, professions or callings or shall exercise any privilege or do any act for which a license is charged by the State of 50 per cent of the State licenses or privilege tax except as herein otherwise provided.'

"The question, which I assume you raise, is whether that portion of Schedule 12 appearing on page 240 (providing certain exemptions) is intended to exempt the automobile dealer from the payment of county license as such automobile dealer. In my opinion, it does not. It is my judgment that the provision 'and not be required to pay any further or additional State and County licenses to handle or sell automobile accessories or parts, radios, tires and batteries, etc.' is meant to apply to those specific things named. As I read the Section, by paying the proper State and County licenses as an automobile dealer, such dealer is exempted from the payment of both State and County licenses levied on dealers in the various other commodities named.

"I am led to this by the specific manner in which the Legislature in various sections, specifically declared that no county license is required. By Schedule 2, it is stated: 'But no license shall be paid to the county.' The same provision appears in Schedule 5, in Schedule 9, in Schedule 10, in Schedule 48, in Schedule 58, in Schedule 100 and in Schedule 106. The emphasis with which the Legislature in these various sections specifically stated that no license should be paid to the county, indicates to my mind that the absence of such provision in Schedule 12 indicated an opposite intent. Schedule 18 levies a license on automobile dealers. It then authorizes such automobile dealer to do certain other things without the payment of an additional license either State or County. The fact that the words 'State license' is inserted in the latter proviso indicates that the licenses from the operation of which the dealer was excepted are those specifically set out.

"It is a rule of construction so well known as to hardly call for citation, that exemptions are to be strictly construed and that none can be given except where there is a clear legislative intent. *State v. Elba Bank & Trust Co.*, 91 So. 991. Applying this rule, it is my judgment that the automobile dealer is liable for both State and County license on each established place of business according to the scale set out in Schedule 12."

Thereafter and by the Act of the Special Session of 1936-37, at page 186, this schedule was amended by adding the following immediately after the Schedule of amounts of licenses:

"Provided, that upon the payment of the license according to the foregoing schedule, a dealer in automobiles may do a general automobile and automotive business and shall not be required to pay any license or privilege tax or tax on the sale of motor vehicles based on the gross receipts or gross proceeds derived from such sales, except the license or privilege tax on the gross proceeds or gross receipts derived from the sale of new automotive vehicles as levied in House Bill 179, approved February 23, 1937, or to pay any additional State and County licenses or privilege tax to sell automobiles or automotive vehicles except the license or privilege tax on gross proceeds or gross receipts derived for the sale of new automotive vehicles as levied in House Bill 179, approved February 23, 1937."

The proviso in Schedule 12 as to non-liability for further licenses to sell accessories, part and so forth, was also changed by adding a reference to the tax on gross proceeds or gross receipts from sales under the provisions of an act known as House Bill 39, approved December 17, 1936, and the tax on gross receipts as levied in House Bill 179.

The question then becomes whether the amendment of the act by the inclusion of the quoted portions changes the construction previously placed upon such Schedule 12 with respect to the necessity of additional county license in each county in which the dealer does business. In my opinion, the amendment does not have that effect. It is my judgment that the amendment was solely for the purpose of making more definite the provisions of this schedule in connection with the Luxury Tax Act (House Bill 179, approved February 23, 1937). You will note there is no specific exemption in the amended act stating that no license shall be paid to the county. The quoted amendment refers to license or privilege tax based on gross receipts. There is then added "or to pay any additional State and County license, etc." As stated in the opinion above quoted, the Legislature has emphasized in certain other sections that no license shall be paid to the county. The absence of any statement in this amended schedule specifically stating that no license shall be paid to the county indicates to me that it was not the intent of the Legislature in amending said Schedule 12 to change the effect of Section 350, subsection (b). In my opinion, therefore, under said schedule, as amended, counties may collect fifty per cent of the license levied for the benefit of the state.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 28, 1937.

Hon. John C. Coleman,
Brigadier General,
The Adjutant General,
Montgomery, Alabama.

State Building Commission unauthorized to purchase transformer for, and make other necessary improvements to, State Arsenal Building out of Capitol Building Fund. However, the Governor is authorized to make such improvements out of the military appropriations of the State.

Opinion by Assistant Attorney General King.

Dear Sir:

This will acknowledge your letter in which you request my opinion as follows:

"The State of Alabama owns a building at Kilby Prison, known as the Arsenal, which is at the present time wired for lighting purposes only, and the power is received from the State Highway line.

"The power now being received from the line as stated above is insufficient to deliver power enough to operate the machinery that we now have installed at the Arsenal. Your opinion is requested as to whether or not the Comptroller has a right to pay out of the Maintenance of Grounds and Buildings Funds, for a transformer and other necessary attachments for the purpose of delivering power sufficient to operate the machinery, that is now installed at the Arsenal."

Your inquiry must be answered in the negative, for the reason that the State Building Commission is limited in its authority to the improvement and enlargement of the Capitol building and grounds, adjacent property thereto, and the governor's mansion. The Act creating the State Building Commission was amended by the 1927 Acts. Section 89 of said Act, as amended, reads as follows:

"Meeting and powers of commission: The said commission shall convene only upon the call of the governor. The said commission has full power and authority, for and in behalf of the State of Alabama, to contract for the extension, enlargement or improvement of the present capitol building and grounds and the governor's mansion and it shall also have full power and authority to provide for the improvement of blocks of property now owned or hereafter acquired by the State adjacent to the block upon which the capitol is now situated by making a harmonious unit of the ground and tearing down the old buildings thereon and the construction thereon of appropriate administrative and judicial buildings and generally to take such steps as may be necessary in accomplishing this purpose. * * *" 1927 General Acts, pages 85 and 86.

In view of the above provisions, which appear to be the last word on this subject, it is obvious that the State Building Commission only has such authority with which it is clothed by the Act creating it and the Act as amended, and nowhere in said Act is it authorized to construct or improve any property other than the State Capitol Building and grounds, adjacent property and the governor's mansion.

However, I might state that, in my opinion, the Governor is authorized to make such improvements, about which you inquire, out of the regular military appropriations of the State.

Section 16 of the Military Code of Alabama provides:

"The Governor shall when necessary designate a depository, or depositories, for the undistributed military property of the State, or in the custody of the State, which depository, or depositories, shall be maintained at the expense of the State: Provided: That the Governor may build, rebuild, or enlarge and maintain out of the unexpended regular military appropriations of the State a centrally located depository, arsenal, or military warehouse for the purposes named in this Section: * * *" Section 16, 1936 General Acts page 109.

I trust that this fully answers your inquiry.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 29, 1937.

Hon. E. A. Kimbrough,
Sheriff, Russell County,
Seale, Alabama.

Jails—County is not liable for cost of refrigeration of prisoners' food in sheriff's home.

Sheriff—Sheriff has no claim against county for rent of his kitchen for preparation of prisoners' food, even though there is no kitchen in jail.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of September 8, 1937, which is as follows:

"Please give me a ruling on the following subject. I as Sheriff of Russell County have to furnish the kitchen at my home for preparing foods for the prisoners confined in the jail, the County has no kitchen of their own. (1) Please advise me whether or not the County should be responsible to me for ice or refrigeration used in my kitchen for preserving the foods used for prisoners confined in jail; (2) also please advise me whether or not the County would be liable to me for a reasonable amount of money for the use of my kitchen as they have no kitchen for which the food can be prepared."

In response to your first inquiry, I refer you to an opinion of this office under date of August 16, 1937, to Hon. I. I. Moses, Chairman, Russell County Court of Commissioners which holds that a county is not authorized to pay for refrigeration of prisoners' food if the refrigerator is kept in the home of the sheriff.

In answer to your second inquiry, I refer you to Section 5024, Code of Alabama 1923.

"Section 5024.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue or any other state or county officer, who takes any contract for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers."

I am of the opinion that the above quoted section prohibits the sheriff from renting his kitchen to be used in connection with the county jail.

In considering further the question of whether or not a county is required to furnish and maintain a kitchen in connection with the county jail, I am unable to find any authority requiring such maintenance.

Section 4826, Code of Alabama, 1923 imposes upon the sheriff the duty of feeding county prisoners but provides no particular manner in which this shall be done. Section 4828, Code of Alabama, 1923, as amended by Act 203, General Acts of 1935, p. 595, provides the allowance for feeding prisoners. Section 4835, Code of Alabama, 1923 provides that in feeding prisoners the sheriff may use foodstuffs from his own garden or store and charge therefor a fair market price.

In considering all of these sections together, it seems to be the patent intent of the legislature to impose directly upon the sheriff the responsibility of feeding prisoners in any manner he sees fit, if it meets with the approval of the county governing body and the State Prison Inspector as provided by Sections 4825 and 4834, Code of Alabama, 1923, respectively.

Therefore, it is my opinion that a county is not required to maintain a kitchen in connection with the county jail except under Section 4860, Code of Alabama, 1923. If it does, however, I am of the opinion that the county may legally equip such kitchen.—Quarterly Report of the Attorney General, Vol. II, p. 241.

It is my opinion that Section 4860, Code of Alabama, 1923 is broad enough to authorize a State Prison Inspector to require the county governing body to build a kitchen in a particular jail if in his opinion such kitchen is "a necessary addition or alteration."

Yours very truly,

A. A. CARMICHAEL,
Attorney General,

September 29, 1937.

Hon. Orlan B. Hill, Attorney
Highway Bridge Commission, Inc.,
Florence, Alabama.

Highway Bridge Commission—

Covenant on part of Bridge Commission with bond buyers for auditing its books annually by the State Comptroller upon instruction of the Governor is valid.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of August 4, 1937 which is as follows:

"The Highway Bridge Commission, Inc. was created by the Legislature of 1935, and is an agency of the State of Alabama. It was created by Act 44, Regular Session of the Legislature of 1935, which was approved February 7, 1935, (Acts 1935, p. 94) and its powers and duties are fully set forth in said Act. Said Commission is now under contract to sell revenue bonds the proceeds of which, together with a Government Grant, are to be used for the purpose of building a highway bridge across the Tennessee River between Florence and Sheffield. Among the conditions precedent made by the bond buyers was one that the books of the Commission, so far as they related to the Florence Sheffield Bridge, should be audited at least once annually by the State Comptroller. The Commission, feeling that its power to require the State Comptroller to make the annual audit might be questioned, submitted this condition to the Governor who instructed the Commission to agree to the condition and stated that the State Comptroller would be required to make such audits at the cost to the Highway Bridge Commission, Inc. and without expense to the State of Alabama. Such condition was included in the provisions of the contract to sell said revenue bonds and the attorneys passing on the legality of the bond issue for the buyers now request "A certified copy of the opinion of the Attorney General sustaining the validity of the covenant on the part of the Bridge Commission for the auditing of its books annually by the State Comptroller.

"In view of Section 806, Code of Alabama, 1923, subdivisions 1, 3 and 6 and Acts of 1932, pp. 35 and 99, is such a covenant when authorized and approved by the Governor valid."

I am of the opinion that your inquiry should be answered in the affirmative, provided the State does not incur any expense in making the audits in question. You state that the expenses of said audits will be borne by the Highway Bridge Commission, Inc.

The Highway Bridge Commission, Inc. was created under the provisions of Act No. 44, H. B. 132, approved February 7, 1935, (Gen. Acts, 1935, p. 94). It is stated in Section 1 of said act that "said commission shall be a public body and body corporate and politic * * *". I am of the opinion that said commission is, therefore, an instrumentality or agency of the State of Alabama, although the State is in no wise liable for its obligations and it cannot create a debt against the State. See *Kansas City Bridge Company v. Ala. State Bridge Corporation*, 59 F. (2d) 48, 287 U. S. 644.

Since the Highway Bridge Commission, Inc. is an instrumentality or agency of the State of Alabama, its fiscal affairs are a matter of concern to the State.

Section 803, subsections 1, 3 and 6 provides as follows:

"Section 806. His duties.—It is the duty of the State Auditor—

"1. To superintend the fiscal affairs of the state, as required by law. * * *

"3. To keep the accounts in relation to the school funds, and every other special or trust fund in which the state is interested, the keeping of which is not specially intrusted to other offices. * * *

"6. To audit and adjust the accounts of all public officers, keeping a regular account with every person in each county in the State who by law is authorized to collect and receive any part of the state revenue, in suitable books, in which he must charge such persons with all sums of money due from them severally, and credit each with all the moneys paid by him to the state treasurer, having first certified to that officer the amount of balance due."

Certain duties heretofore imposed upon the State Auditor, which include the above, were transferred to the State Comptroller by Act No. 104, Senate Bill 88, approved October 19, 1932. (General Acts 1932, p. 99). The office of State Comptroller was created by Act 37, Senate Bill 87, approved September 27, 1932, (Gen. Acts, 1932, p. 35). This Act places the **State Comptroller under the general direction, supervision and control of the Governor.** (See Section 3).

It will be seen from the above that the State Comptroller is required to audit the accounts, books and records of a State agency or instrumentality under the direction, supervision and control of the Governor.

Since the Highway Bridge Commission, Inc. is an agency or instrumentality of the State, the Governor may direct the State Comptroller to audit its accounts, books and records.

In view of the foregoing, the agreement of the Highway Bridge Commission, Inc. with the buyers of the bonds, that the books of the Commission be audited once annually by the State Auditor, having been made a part of the contract on the order of the Governor and the Governor having directed the State Comptroller to make such annual audit, it is my opinion that such covenant constitutes a valid and binding obligation on the part of the Commission. However, the expenses of said audit should be borne by the commission as the State is not liable for any expenses for the auditing, incurred on behalf or by the commission. (See Acts of 1935, p. 94, supra.)

Yours very truly,

A. A. CARMICHAEL,
Attorney General,

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